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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF MARYLAND, FOR THE USE OF MARY JANE MEYER, ET AL.; STATE OF MARYLAND, FOR THE USE OF VANCE LEWMAN BRADY, ET AL.; AND CAPITAL AIRLINES, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the District of Columbia Circuit entered in these cases on June 13, 1963.

OPINIONS BELOW

The findings of fact and conclusions of law of the district court on the issue of vicarious liability (J.A. 679–688),[1] and the opinions of the district court on negligence and damages (J.A. 725–728, 789–790) are unreported. The opinion of the court of appeals (App., *infra*, pp. 1a–14a) has not yet been reported.

[1] "J.A." references are to the Joint Appendix filed in the court of appeals, nine copies of which have been filed in this Court.

JURISDICTION

The judgments of the court of appeals were entered on June 13, 1963 (App., *infra*, pp. 15a–16a). By order dated September 7, 1963, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including October 11, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether members of the National Guard of the States, acting as civilian employees of the Guard and receiving pay from federal funds in that capacity, are employees of the United States within the meaning of the Federal Tort Claims Act.

2. Whether, assuming such persons are federal employees, the applicable federal statute and regulations confer upon the United States a right to control and supervise these activities sufficient to justify the imposition upon the government of vicarious tort liability.

CONSTITUTION, STATUTES, AND REGULATIONS INVOLVED

1. The Constitution of the United States provides in pertinent part:

> Art. I, Sec. 8. The Congress shall have Power * * *
>
> To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the

Militia according to the discipline prescribed by Congress; * * *

2. The Federal Tort Claims Act provides in pertinent part (Title 28, United States Code):

§ 1346: *United States as defendant.*

* * * * * *

(b) Subject to the provisions of chapter 171 of this title, the district courts, * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * * *

§ 2671. *Definitions.*

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term—

* * * * * *

"Employees of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

3. The National Defense Act of 1916 (39 Stat. 166), as amended, provides in pertinent part (Title 32, United States Code):

Section 709. *Caretakers and clerks.*

(a) Under such regulations as the Secretary of the Army may prescribe, funds allotted by him for the Army National Guard may be spent for the compensation of competent persons to care for material, armament, and equipment of the Army National Guard. Under such regulations as the Secretary of the Air Force may prescribe, funds allotted by him for the Air National Guard may be spent for the compensation of competent persons to care for material, armament, and equipment of the Air National Guard. A caretaker employed under this subsection may also perform clerical duties incidental to his employment and other duties that do not interfere with the performance of his duties as caretaker.

* * * * *

(d) Under regulations to be prescribed by the Secretary concerned, one commissioned officer of the National Guard in a grade below major may be employed for each pool set up under subsection (c) and for each squadron of the Air National Guard. Commissioned officers may not be otherwise employed under this section.

* * * * *

(f) The Secretary concerned shall fix the salaries of clerks and caretakers authorized to be employed under this section, and shall designate the person to employ them.

4. The Air National Guard Regulations (ANGR) 40–01 (20 Dec. 1954) provided in pertinent part:

Section I

* * * * *

a. Section I

* * * * *

2. Policy:

* * * * *

b. Air National Guard civilian personnel must be federally recognized members of the Air National Guard of the State, Territory, Puerto Rico, or the District of Columbia except for the employment of:

(1) Females (when specifically authorized by the Chief, National Guard Bureau).

(2) Temporary personnel paid from funds other than those designated for the pay of air technicians.

c. Officers will not be appointed to Air National Guard civilian personnel positions authorized for airmen, nor will airmen be appointed to positions authorized for officers.

* * * * *

i. Air National Guard civilian personnel will occupy the T/O vacancy most comparable to that civilian position.

* * * * *

3. Authority:

a. Basic authority for the employment of Air National Guard civilian personnel is contained in Section 90, National Defense Act, as amended.

b. Authority is delegated to the adjutants general of the several States, Terri-

tories, Puerto Rico, and the District of Columbia, to employ, fix rates of pay, establish work hours (a minimum of 40 hours per week), supervise, and discharge employees within the purview of this regulation; subject to the provisions of law and such instructions as may be subsequently issued by the Chief, National Guard Bureau.

4. Status. Air National Guard civilian personnel are considered to be employees of the State, Territory, Puerto Rico, or the District of Columbia (21 Comp. Gen. Dec. 305).

5. Definitions. For the purpose of this Regulation:

a. "Air National Guard civilian personnel" means any and all civilians employed by the several States, Territories, Puerto Rico, and the District of Columbia, permanent or temporary, male or female, supported wholly or in part by Federal funds appropriated for that purpose, including but not limited to the following:

(1) "Air technician" means a person employed for the performance of the duties of positions listed on the manning guide and paid from funds designated for the pay of air technicians.

* * * * *

b. Section III

7. Appointment:

a. *Authority.* Appointment of Air National Guard civilian personnel is a function of the adjutant general.

* * * * *

STATEMENT

On the morning of May 20, 1958, a Viscount passenger airplane owned by Capital Airlines collided over Brunswick, Maryland, with a jet trainer airplane owned by the United States and assigned to the Air National Guard of Maryland. Both airplanes were destroyed, and all of the passengers and crews, except the pilot of the jet trainer, were killed. At the time of the accident, the pilot of the trainer was both a commissioned officer in the Maryland Air National Guard and a civilian air technician paid with federal funds pursuant to the so-called "caretaker" statute, 32 U.S.C. 709.

These suits brought under the Federal Tort Claims Act, seek to impose liability on the United States for the pilot's alleged negligence.

1. BACKGROUND

(a) *The National Guard:* The National Guard is a constituent part of the militia of each State. 32 U.S.C. 101(4) and (6); 10 U.S.C. 3079, 8079. While the federal government prescribes its discipline, furnishes it with arms and supplies, and provides compensation for its members, the actual recruitment, selection, and training of National Guard personnel are reserved to the States. (Constitution, Art. I, Sec. 8, Cl. 16; 32 U.S.C. 101(4) and (6), 501; J.A. 290.) To qualify for federal support, the State units are required to maintain "federal recognition" by passing annual inspections designed to assure that their members, organization, training, instruction

and property meet prescribed federal standards. 32 U.S.C. 105, 108. But unless and until the Guard is called into active federal service, it is subject to the exclusive command and control of the governor and other State officials, and its officers and men, although "federally recognized," are not considered officers or employees of the United States. 32 U.S.C., 109(b); J.A. 282.

(b) *The Air Technician Program:* 32 U.S.C. 709, the so-called "caretaker" statute, provides, *inter alia,* that "funds allotted by [the Secretary of the Air Force] for the Air National Guard may be spent for the compensation of competent persons to care for material, armament, and equipment of the Air National Guard" (par. (a)) and that the Secretary "shall fix the salaries of clerks and caretakers authorized to be employed under this section, and shall designate the person to employ them" (Par. (f)). Under regulations issued pursuant to Section 709 (now ANGR 40–01, dated Sept. 21, 1962; the regulations in effect at the time of the accident were substantively the same), authority to employ, supervise and discharge civilian personnel of the Air National Guard (including air technicians), is delegated to the adjutants general of the several States (Sec. 1, par. 3(b)). With certain exceptions not here relevant, such personnel must be members or officers of the Air National Guard (*id.,* par. (2)). The regulations declare that "Air National Guard civilian personnel are considered to be employees of the State * * *" (*id.,* par. 4).

The regulations accurately describe the air technician program both as it actually operated in 1958 and as it operates today. Civilian air technicians constitute about 19% of the personnel of the Air National Guard and are considered its "backbone." Although the majority are enlisted men, officers in squadrons hold air technician positions such as base commander, operations training supervisor, flying training supervisors, supply officers and maintenance officers (J.A. 293). The grade, status, and promotions of the civilian employees are determined by State officials acting for the Governor (J.A. 295). State officers also determine the hours and working conditions of the civilian employees, supervise their daily work, and give work assignments pursuant to State policy (J.A. 295). No federal officers or agencies have authority to promote or discharge the civilian personnel, or to assign, control or supervise their daily work (J.A. 295–296). Finally, although Section 709(f) authorizes the Secretary of the Air Force to fix the salaries of the "caretakers," many States pay less than the maximum amount specified by the Secretary, while others pay more than the federal maximum, augmenting the federal money with State funds (J.A. 293–294).

The civilian employees of the National Guard are not within the federal civil service[2] nor do they receive the disability, death and retirement benefits provided by the Federal Civil Service Retirement

[2] Volume 4, Hearings before the House Appropriations Committee, 84th Cong., 2d Sess., relative to the Department of the Air Force appropriation for the fiscal year 1957, pp. 998–999.

System (ANGR, Sec. 1, par. 14). However, under the policy of the Bureau of Employees' Compensation of the United States Department of Labor, Federal Employee Compensation benefits are payable upon the injury or death of such employees while performing their duties (App. 7a).

2. THE FACTS OF THIS CASE

Captain McCoy held a commission from the Governor of Maryland as a captain in the Maryland Air National Guard (J.A. 37, 661). A jet fighter pilot on flying status, he was assigned to the 104th Fighter-Interceptor Squadron, stationed at Martin Field, near Baltimore. His military duties also included service as the "aircraft maintenance officer" of the Squadron (J.A. 92, 131). In his capacity as civilian air technician, Captain McCoy held the position of Aircraft Maintenance Chief and Acting Maintenance Supervisor. As such, he was in charge of the maintenance of 28 airplanes owned by the United States and assigned to the 104th Squadron (J.A. 681). At no relevant time was the Squadron in the active federal service (J.A. 283).

For some time prior to May 20, 1958, Captain McCoy had been attempting to interest an acquaintance of his, Donald Chalmers, in joining the Maryland Air National Guard (J.A. 83). On the prior Saturday he had requested permission from his commanding officer, Lt. Col. Kilkowski, to take Chalmers as a passenger on a flight, with a view to increasing his interest in the Guard (J.A. 63, 139). On May 20,

Col. Kilkowski authorized Captain McCoy to make such a flight with Chalmers (J.A. 139, 151). The flight order, issued by order of the commanding officer of the 104th Fighter Squadron, and authorized by the Maryland Air National Guard, directed Captain McCoy to make a flight "for purpose of maintaining flying proficiency"[3] (J.A. 209, 207). Apparently because of the passenger, the flight was to be made in one of the unit's two training airplanes, rather than in one of the fighters. Although the flight was primarily a "proficiency" (*i.e.*, training)[4] flight, Captain McCoy also checked the efficiency of the equipment to determine whether it was working properly (J.A. 684). To that extent, the flight was related to his civilian maintenance job. And since he had qualified for all of the military flight pay to which he was entitled for the period in question, and the flight occurred during a day on which he was acting as a civilian air technician, he was drawing compensation

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[3] Captain McCoy was a rated pilot on flying status. In order to maintain that rating, he was required to fly 100 hours a year.

[4] Part of the training of flying officers of the Air National Guard consists of "proficiency flights," which are training flights not test flights (J.A. 161–162). See App. 5a, and fn. 5, *infra*, p. 12.

Although the requirement of 100 hours' annual flying time is federal, the times, routes and methods of performing flights in Air National Guard planes were controlled by state officers (J.A. 283–285, 300, 337–338). Many proficiency flights of the 104th Squadron were made at times other than the organized drills, both by air technicians and other pilots of the unit (J.A. 68).

during the period of the flight in his civilian capacity as an air technician (J.A. 599).[5] It was this flight which resulted in the collision giving rise to this litigation.[6]

3. THE PROCEEDINGS BELOW

Capital Airlines, together with the survivors of the pilot and co-pilot of its airplane, brought these suits under the Tort Claims Act, asserting that the United States was responsible for Captain McCoy's negligence in piloting the airplane. The district court held a trial on the preliminary question whether Captain McCoy was an employee of the United States acting within the scope of his employment. While the court made extensive findings as to Captain McCoy's civilian and military employment (J.A. 679–688), it made no findings as to whether any federal official had the right to hire, supervise, or discharge him, or to control

[5] Although air technicians are on civilian pay status during their regular work week, they receive flight pay in their military capacity for any proficiency flights they undertake, unless they have already qualified for all the flight pay they are entitled to receive for the period (J.S. 153–154). When the pilot has qualified for all of the flight pay, he is, when flying, considered to be on inactive military duty training status without military pay (J.A. 128, 155). In such circumstances however, he can receive civilian pay as an air technician for the period of the flight (J.A. 156).

[6] Suits arising out of the same collision have also been filed in Pennsylvania, Illinois, Ohio and New York. The two Pennsylvania actions have been tried (largely upon the record made in these cases), and resulted in judgments of $427,000 against the United States. The government's appeals in these two cases have been briefed and argued, but are still pending in the Court of Appeals for the Third Circuit (Nos. 14041 and 14042).

him in the performance of his work. The court found that at the time of the accident "Captain McCoy was at least in part carrying out his civilian work as Aircraft Maintenance Chief and Acting Maintenance Supervisor" (J.A. 687). It ruled, moreover, as a matter of law, that a person employed as an air technician (caretaker) in a non-activated National Guard Unit is an employee of the United States within the meaning of the Federal Tort Claims Act (J.A. 688).

The remaining issues were then tried separately to the district court, which found Captain McCoy's negligence to be the sole proximate cause of the accident and entered judgments for Capital Airlines and the individual plaintiffs.

The government appealed from the judgments on the questions of its responsibility for the actions of Captain McCoy, and the amount of damages awarded to Capital Airlines. On the authority of *United States* v. *Holly*, 192 F. 2d 221 (C.A. 10) and subsequent cases,[1] the court of appeals held that, as an air technician receiving pay pursuant to the caretaker statute, Captain McCoy was an employee of the federal government (App. 6a). Moreover, while recognizing that in Maryland, as in most other States,[2] an employer can be held accountable for the torts of an employee only if he has the right to direct and control the very activity which causes the injury (App. 11a–12a), the

[1] *Elma* v. *United States*, 197 F. 2d 230 (C.A. 5); *United States* v. *Duncan*, 197 F. 2d 233 (C.A. 5); *Courtney* v. *United States*, 230 F. 2d 112 (C.A. 2); *United States* v. *Wendt*, 242 F. 2d 854 (C.A. 9).

[2] See, Restatement, *Agency 2d*, §§ 220, 227, 228.

court held that the United States did have "the ultimate right of control over" Captain McCoy (App. 7a). Accordingly, it affirmed the decision of the district court.[9]

REASONS FOR GRANTING THE WRIT

These cases present important issues as to the liability of the United States under the Federal Tort Claims Act for the tortious conduct of civilian personnel of the National Guard who receive compensation from federal funds under the so-called "caretaker" statute (32 U.S.C. 709). Two distinct, though related, questions are involved, both of which, we urge, were wrongly decided by the court below and warrant definitive resolution by this Court. The first question is whether civilian personnel of the National Guard are "employees" of the United States within the meaning of the Tort Claims Act. The second question is whether—assuming that such persons are "employees" of the United States—the applicable federal statute and regulations give federal officials the right to direct and control them in the performance of their duties; for only if such right exists would the United States, "if a private person, * * * be liable to the claimant in accordance with the law of the place where the act or omission occurred," (28 U.S.C. 1346(b)) in this instance, Maryland. The court of appeals answered both of

[9] On the question of damages to Capital Airlines, the court held that the district court had erred in awarding Capital the reproduction cost of its airplane, rather than its fair market value, and reversed and remanded the judgment in regard to Capital Airlines for a finding of damages based upon fair market value (App. 12a–14a).

these questions in the affirmative. On the second issue, its decision is in conflict with a recent decision of the Tenth Circuit.[10]

Civilian employees of the Air National Guard, including technicians, make up 19 percent of the total membership and number more than 14,800 employees. Since they are on duty a full work week, they are considered its "backbone" (App. B, *infra*, p. 20a). Similarly, there are approximately 21,800 civilian employees of the Army National Guard.[11] The question of the government's responsibility under the Tort Claims Act for the conduct of such employees has been a subject of recurrent litigation involving substantial sums of money. Indeed, the single air crash giving rise to these actions has resulted in judgments against the United States of $2,063,050,[12] and 11 other

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[10] One might phrase the two questions as one: Whether the United States may be held liable, under the Tort Claims statute, for acts performed by civilian personnel of the National Guard. Certainly, it is true that factors relevant to the question whether such persons are properly deemed federal employees at all are relevant, also, for purposes of determining the degree of federal control over their activities. But since the federal Act uses the term "employee of the government," we consider, first, the question of employment status and, secondly, whether in any event the United States exercises a measure of control which would bring into play the State's rule of *respondeat superior*.

[11] Estimates of strength are as of June 30, 1963.

[12] In addition to the three cases at bar, two actions involving judgments of $427,000 are now on appeal to the Third Circuit (Nos. 14041 and 14042). See fn. 6, *supra*, p. 12. The amount of the award in the *Capital Airlines* case should be reduced (see footnote 9, *supra*, p. 14). On October 8, 1963, the district court made findings, which, if sustained, would reduce Capital's judgment by $130,000, leaving a total of $1,933,050 in existing judgments.

actions seeking more than $3,495,000 in damages are still pending.[13]

The prospective importance of these issues is not significantly diminished by the fact that in 1960 Congress provided for a limited administrative settlement of claims arising out of torts committed by National Guard personnel (32 U.S.C. (Supp. II) 715; see *infra*, pp. 21a–23a). For, as the court below indicated (App. 10a), the new statute creating that remedy contains no provision making it exclusive. Thus, if the court of appeals is correct in holding that the United States is answerable in damages for the conduct of such employees under the Tort Claims Act, claimants may have a choice of remedies, one under the new statute and the other under the Tort Claims Act, and would be free to pursue both.

1. The courts of appeals have uniformly and correctly held that members of the National Guard performing training and other military duties (except when called into active federal service) are not employees of the United States within the meaning of the Federal Tort Claims Act.[14] With equal consist-

[13] Although there are 11 actions, they involve only 7 deaths. The actual amount of damages is likely, of course, to be substantially less than the amount claimed.

[14] *Williams* v. *United States*, 189 F. 2d 607 (C.A. 10); *Dyer* v. *United States*, 192 F. 2d 431 (C.A. 5); *McCranie* v. *United States*, 199 F. 2d 581 (C.A. 5); *Storer Broadcasting Co.* v. *United States*, 251 F. 2d 268 (C.A. 5), certiorari denied, 356 U.S. 951; *Braslow* v. *United States*, 309 F. 2d 465 (C.A. 6); *Pattno* v. *United States*, 311 F. 2d 604 (C.A. 10), certiorari denied, 373 U.S. 911; *Blackwell* v. *United States* (C.A. 5, No. 20121). Some of the district court cases are collected in *Storer Broadcasting Co.* v. *United States*, *supra*. Accord:

ency—but incorrectly in our view—they have held that members of the Guard acting in the capacity of full-time civilian "caretakers" or air technicians are federal employees.[15] There is no reasonable basis for the dichotomy which has thus developed.

Civilian employees of the National Guard, like members and officers performing military functions, are paid from federal funds. In both cases, the federal government sets standards which the National Guard units must meet in order to receive federal support. But unless and until the unit is called into active federal service, the State and its officials exercise the exclusive right to command and control the activities of the Guardsmen, both in their military and civilian capacities (*supra*, pp. 7–10). In each case the State officials select from qualified candidates the person to be enlisted and employed, and have the exclusive

United States ex rel Gillett v. *Dern*, 74 F. 2d 485, 487 (C.A. D.C.); *O'Toole* v. *United States*, 206 F. 2d 912 (C.A. 3) (where members of the National Guard of the District of Columbia were held to be federal employees, because that organization is under the direct command of the President, who appoints its officers and who, through a direct chain of command, controls its activities).

[15] *United States* v. *Holly*, 192 F. 2d 221 (C.A. 10); *Elmo* v. *United States*, 197 F. 2d 230 (C.A. 5); *United States* v. *Duncan*, 197 F. 2d 233 (C.A. 5); *Courtney* v. *United States*, 230 F. 2d 142 (C.A. 2); *United States* v. *Wendt*, 242 F. 2d 854 (C.A. 9). In *Pattno* v. *United States*, 311 F. 2d 604 (C.A. 10), certiorari denied, 373 U.S. 911, of course, the court held that the officer air technician was an employee of the United States (311 F. 2d at 606–607) but denied liability on the ground that he was on loan to and under control of the state. See *infra*, pp. 24–26.

right to promote, demote, or discharge them.[16] In neither case does any federal official have authority to supervise the conduct of the Guard members. These considerations, which have led the courts to hold unanimously that National Guard members engaged in training and other military duties are not federal employees, compel the same conclusion in the case of the Guard's civilian caretakers and air technicians.

Nothing in the language or history of either the "caretaker" statute (32 U.S.C. 709) or the Tort Claims Act justifies the difference in treatment. The former provision simply declares that "funds allotted" to the States for the National Guard "may be spent for the compensation of competent persons to care for material, armament, and equipment" and that the "Secretary [of the Air Force] shall fix the salaries of clerks and caretakers authorized to be employed under this section, and shall designate the person to employ them" (*supra*, p. 4). It is clear from the legislative history that Congress intended and understood that the person "designated" by the Secretary to "employ" the caretakers would be a State, rather than a federal, official (Sen. Rep. No. 635, 74th Cong., 1st Sess., pp. 2–3), and that those receiving pay under Section 709 would be employees of the States and not the federal government (App. B, *infra*, pp. 17a–19a). In accordance with that understanding, the regulations under Section 709 provide that "Air National

[16] In each case the federal government may cut off funds for unqualified persons and thus in most instances cause their discharge. See J.A. 289–290.

Guard civilian personnel are considered to be employees of the State * * *," and delegate to the adjutants general of the several States the authority to employ, supervise, and discharge such employees, fix their rates of pay and establish their working hours (*supra*, pp. 5–6).[17]

The civilian personnel of the National Guard, moreover, are deemed by Congress to be State employees for Social Security purposes[18] and for purposes of the payroll deductions for State retirement funds;[19] they are not within the federal civil service and are ineligible to receive the disability, death and retirement benefits provided by the Civil Service Retirement System (*supra*, pp. 9–10).[20]

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[17] The Army National Guard regulations are to the same effect (NGR 51, Sec. 1, par. 4(b)).

[18] 42 U.S.C. 418(b)(5); H. Rep. 1698, 83d Cong., 2d Sess., p. 50; Sen. Rep. 1987, 83d Cong., 2d Sess., pp. 45–46.

[19] 5 U.S.C. 84d; Sen. Rep. 2045, 84th Cong., 2d Sess., p. 1; see also 5 U.S.C. (Supp. IV) 84d and 32 U.S.C. (Supp. IV) 709(f) (concerning federal contribution to State retirement funds); H. Rep. 786, Sen. Rep. 709, 87th Cong., 1st Sess.

[20] To be sure, the Bureau of Employees' Compensation awards such employees benefits under the Federal Employees' Compensation Act (App 7s). However, the concept of employment under workmen's compensation acts and other remedial legislation is much broader than the relationship which imposes vicarious liability under principles of common law. *NLRB* v. *Hearst Publications*, 322 U.S. 111, 120–122; *O'Leary* v. *Brown-Pacific-Maxon*, 340 U.S. 504, 506–507. For similar reasons, *Layne* v. *United States*, 295 F. 2d 433 (C.A. 7), certiorari denied, 368 U.S. 996, relied upon by respondents below, is not in point. Indeed, federal compensation under the Act is awarded to National Guardsmen training in summer camp in their military capacity. (*In the Matter of Eleanor M. Barr, claiming as widow of 1st Lt. Robert A. Barr, deceased National Guards-*

We note, finally, that in 1960 Congress rejected a bill which would have expanded the coverage of the Federal Tort Claims Act to make the United States liable for the negligence of National Guard personnel, both civilian and military (see discussion in App. B, *infra*, pp. 21a–23a). Instead, adopting the recommendation of the Department of the Army, it established a limited administrative remedy for claims resulting from the activities of both classes of Guard employees (32 U.S.C. (Supp. II) 715).[21] The Senate Committee gave the following explanation for its refusal to modify the Tort Claims Act (Sen. Rep. 1502, 86th Cong., 2d Sess., p. 4):

> The crux of this matter lies in the fact that the National Guard is primarily under State control, as opposed to Federal control. * * *

Similarly, the House Committee believed that it would be "unwise to extend the coverage" of the Act to include conduct of civilian and military members of the Guard, since "Federal authorities do not have command and control over National Guard units and members not in active Federal service." H. Rep. 1928, 86th Cong., 2d Sess., p. 4. That reasoning is no less applicable to the civilian personnel of the Guard than to members who perform purely military

Bain, 10 ECAB 206), in circumstances where the United States would not be held liable for their conduct under the Tort Claims Act (fn. 14, *supra*, pp. 16–17).

[21] This amendment authorizes the Secretary of the Army and the Secretary of the Air Force to settle and pay claims in an amount not more than $5,000 and to report amounts in excess of that ceiling to Congress for its consideration.

duties, a fact which Congress impliedly recognized when it made the same administrative remedy available for the conduct of both categories of employees.

2. (a) Even if civilian personnel receiving compensation under the "caretaker" statute are assumed to be federal employees, it does not follow that the United States is answerable for their torts. Under the Federal Tort Claims Act, the United States is accountable for the negligent conduct of an employee within the scope of his employment only "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law" of the State (28 U.S.C. 1346).[22] In most, if not all, of the States, the law of *respondeat superior* recognizes the fundamental unfairness of subjecting the employer to vicarious tort liability unless he has the right to direct and control the very activities of the servant which give rise to the injury.[23] As we have already shown (*supra*, pp. 7–10), civilian employees of the National Guard, although compensated by federal funds, are under the exclusive command and supervision of State officials. Only State officials have the right to tell them when, where and how to perform their duties.

In the cases at bar, the orders authorizing and directing the flight in question, and prescribing its route,

[22] 28 U.S.C. 1346(b); *Williams* v. *United States*, 350 U.S. 857; *Fries* v. *United States*, 170 F. 2d 726 (C.A. 6), certiorari denied, 336 U.S. 954; *Calloway* v. *Garber*, 289 F. 2d 171 (C.A. 9).

[23] Restatement, *Agency 2d*, §§ 220, 227.

were signed by the order of the Commander of the 104th Squadron, whose authority was, of course, derived from the Governor of Maryland through the Adjutant General of Maryland (J.A. 209, 207, 293–295). No federal officer or employee had any right to authorize or direct the flight, to prescribe an itinerary, or in any other way physically to control or supervise Captain McCoy's piloting of the airplane. And in Maryland, as in most other States, the law of *respondeat superior* imposes vicarious tort liability only if the asserted master has the right to control and direct the particular activities giving rise to the injury.[24] Only upon a mistaken belief that Federal officials had a right to control and supervise McCoy could the United States be held accountable for his negligence.

The result reached by the court of appeals did not stem from any misapprehension as to State law. Indeed, the court quoted at length (App. 11a–12a) a leading Maryland decision, *Keitz* v. *National Paving & Contracting Co.*, 214 Md. 479, 491, 134 A. 2d 296, 301, emphasizing, as the decisive test of liability, whether the employer had the *"right to control and direct the servant in the performance of his work and in the manner in which the work is to be done"* (emphasis in original). Its error—an error of federal

[24] *E.g.*, *Henkelmann* v. *Metropolitan Life Insurance Co.*, 180 Md. 591, 26 A. 2d 418; *Gallagher's Estate* v. *Battle*, 209 Md. 592, 122 A. 2d 93, certiorari denied, 352 U.S. 894. The Maryland cases allow the imposition of liability on two masters only when each retains the concurrent authority to control the activities of the servant. *Baur* v. *Calic*, 166 Md. 387, 401, 171 Atl. 713.

law—was in holding that "in an ultimate sense the right of control was in the Federal Government at the time and in the circumstances of this accident" (App. 7a).[25] That conclusion reflects a fundamental misunderstanding of the nature of the federal government's role under the caretaker statute and pursuant regulations. The relationship of the government to civilian personnel of the National Guard is not, as the court below supposed (App. 7a), comparable to that of a plant owner who exercises ultimate control over his employees, though delegating the task of immediate supervision to a "foreman" (the State). Rather, the function of the Secretary of the Army and Air Force under the caretaker statute, and indeed under the National Defense Act as a whole, is simply to pre-

[25] The court below also erred in believing that an "ultimate" right of control would be enough to justify the imposition of vicarious tort liability. In that regard the court's approach is strikingly at variance with that of the Sixth Circuit in *Fries* v. *United States*, 170 F. 2d 726, certiorari denied, 336 U. S. 954. There the court held that the United States was not responsible under the Federal Tort Claims Act for the acts of persons who, though concededly federal employees receiving federal pay, were on loan to a local government and engaged in a project under the sole supervision of a local official. The *respondeat superior* law of Kentucky, to which the court in *Fries* was referred by the Tort Claims Act, was essentially the same as that of Maryland in requiring, as a prerequisite to vicarious tort liability, a right to control the very activity giving rise to the injury. *Henkelmann* v. *Metropolitan Life Insurance Co.*, 180 Md. 591, 601, 26 A. 2d 418, relying upon *Leachman* v. *Belknap Hardware & Mfg. Co.*, 260 Ky 123, 84 S.W. 2d 46.

scribe standards, allocate funds, and fix the limits of Federal funds to be used for salaries. In no meaningful sense does any federal official—except of course, when the Guard is on active federal service—have the right, "ultimate" or otherwise, to supervise the actual performance of their duties by National Guard personnel, whether civilian or military. To be sure, such authority could be created by a statutory amendment, and conceivably even by a major revision of the regulations. Plainly, however, the legal responsibility of the United States for the negligence of National Guard employees does not depend upon the supervisory powers federal officials might have under some hypothetical regulatory scheme, but rather upon the right of control (or lack of it) which is theirs under the existing system.

b. On this issue, the decision below conflicts with the recent decision of the Tenth Circuit in *Puttno* v. *United States*, 311 F. 2d 604, certiorari denied, 373 U.S. 911. There, the plaintiff sought damages from the United States for injuries caused by the alleged negligence of the pilots of two jet fighters owned by the United States, but assigned to the Wyoming Air National Guard. One of the pilots, in addition to being a National Guard officer, was a civilian flying instructor receiving salary pursuant to 32 U.S.C. 709[26] (311 F. 2d at 606; R. 32).[27] At the time of the

[26] The other pilot was simply an officer of the Guard, and not a civilian employee. In accord with the consistent holdings of that and other courts, the court held that he was an employee of the State for whose acts the United States was not liable. 311 F. 2d at 605–606.

[27] "R." references are to the printed record in *Puttno*, a copy of which has been made available to opposing counsel.

accident, he was receiving pay as a civilian employee and was engaged in a training flight to evaluate the proficiency of the other pilot—the very function for which he had been employed as an air technician (R. 60–61). Although holding that a civilian employee of the National Guard appointed pursuant to the "caretaker" statute is a federal employee,[28] the court nonetheless denied recovery on the ground that the flight was under the exclusive control and supervision of the State and in furtherance of the State's business, and that the Wyoming law of *respondeat superior* (like that of Maryland and of the States generally) did not impose vicarious liability on an employer for the tortious conduct of a servant acting under the sole direction and upon the business of another."

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[28] Following its decision in *United States* v. *Holly*, 192 F. 2d 221 (C.A. 10). Compare, pp. 16–21, *supra*.

[29] The so-called caretaker decisions of the courts of appeals are not to the contrary. *United States* v. *Holly*, 192 F. 2d 221 (C.A. 10); *Elgin* v. *United States*, 197 F. 2d 230 (C.A. 5); *United States* v. *Duncan*, 197 F. 2d 233 (C.A. 5); *Courtney* v. *United States*, 230 F. 2d 112 (C.A. 2); *United States* v. *Wendt*, 242 F. 2d 854 (C.A. 9). Each of these cases involved only the question of whether civilian employees of the National Guard, receiving pay pursuant to the caretaker statute, were employees of the United States within the meaning of the Tort Claims Act. (For a further discussion of this issue and these cases see *supra*, pp. 16–19.) In none was there any dispute between the parties as to whether the applicable State law of *respondeat superior* would impose vicarious tort liability on a private employer in like circumstances.

The court in *Wendt* raised the issue *sua sponte* and ruled that there would be liability under the *respondeat superior* law of the State of Washington. It did not focus on the

The court below attempted to distinguish *Pattno*, not by pointing to any difference between the law of Wyoming and that of Maryland (for there was none), but rather on the ground that the flight in that case was a training flight, whereas the one in the present case was (in part) "within the caretaker [maintenance] function" (App. 5a, 6a, fns 2, 3). That distinction is plainly insubstantial. In the first place, although Captain McCoy admittedly made certain equipment checks during the course of the flight (J.A. 684), the primary and official purpose of the flight was to keep up his proficiency as a pilot; it was chiefly a "training," not a "test," flight (supra, pp. 11–12, fns. 4–5).

Furthermore, no different result would be warranted even if the *sole* motion of the flight had been to test the plane for maintenance purposes. The maintenance duties, too, were part of the business of the State, for the National Defense Act charges the State with responsibility for the care and maintenance of all federal equipment assigned to the National Guard (32 U.S.C. 105(a)(1), 702 (a) and (d), 710(c); J.A. 287–288). Moreover, in adopting subsection (d) of the caretaker statute, the only provision which expressly authorizes the appointment of National Guard officers (as opposed to enlisted men) as caretakers, Congress specifically contemplated that these officers would be utilized in their civilian capacity both for the maintenance of equipment and for the supervision

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question of the right to control the civilian employee, and accordingly we do not believe it appropriate to assert a conflict between that case and *Pattno*, *supra*.

of flying training (H. Rep. 1031, 69th Cong., 1st Sess., p. 3; Sen. Rep. 785, 69th Cong., 1st Sess., p. 1). And, as we have observed, only State officials have authority to command civilian air technicians, whether their function be training or maintenance. Thus, it would be wholly unreasonable to make the liability of the United States turn upon whether, at the time of the accident, the air technician is engaged in flight training, in maintenance activity, or (like Captain McCoy) in both. Regardless of the particular task, the civilian employee is acting under the exclusive control of the State and performing part of the State's business.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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OCTOBER 1963.

APPENDIX A

United States Court of Appeals for the District of Columbia Circuit

No. 16953

UNITED STATES OF AMERICA, APPELLANT

v.

STATE OF MARYLAND, FOR THE USE OF MARY JANE MEYER, ET AL., APPELLEES

No. 16954

UNITED STATES OF AMERICA, APPELLANT

v.

STATE OF MARYLAND, FOR THE USE OF VANCE LEWMAN BRADY, WIDOW, ET AL., APPELLEES

No. 16955

UNITED STATES OF AMERICA, APPELLANT

v.

CAPITAL AIRLINES, INC., A CORPORATION, APPELLEE

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Decided June 13, 1963.

Mr. David L. Rose, Attorney, Department of Justice, with whom *Acting Assistant Attorney General Guilfoyle, Messrs. David C. Acheson,* United States

Attorney, *Morton Hollander, John G. Laughlin, Jr.*, and *Enoch E. Ellison*, Attorneys, Department of Justice, were on the brief, for appellant.

Mr. Richard W. Galiher, with whom *Mr. William E. Stewart, Jr.*, was on the brief, for appellees.

Before FAHY, DANAHER and BURGER, *Circuit Judges*.

FAHY, Circuit Judge: A mid-air collision occurred over Maryland between a jet plane owned by the United States, and used by the Maryland Air National Guard, and a passenger plane of Capital Airlines. The passengers and crew in the Capital plane were killed and the plane was destroyed. A passenger in the jet plane was also killed. The only other occupant of the jet plane was its pilot, Captain McCoy, who was ejected and came down safely by parachute.

The survivors of the pilot and co-pilot of the Capital plane sued the United States under the Federal Tort Claims Act. Capital also sued the United States under the same Act for damages due to loss of its plane. Negligence of the jet pilot was found at trial and judgment against the United States was entered for all plaintiffs. The United States appeals, but confines its contentions to questions involving the availability to plaintiffs of the Federal Tort Claims Act and the amount of damages awarded Capital for loss of its plane. Neither negligence on the part of Captain McCoy nor the amount of damages awarded to the individual plaintiffs is now contested.

Liability of the United States under the Federal Tort Claims Act, 28 U.S.C. § 1346(b), set forth in the margin,[1] depends upon whether the jet pilot was an

[1] Section 1346. United States as defendant.

"(b) Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury

"employee of the Government" at the time of the accident; and, if so, was "acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred," which was Maryland.

Upon the basis of abundant evidence, followed by elaborate findings and conclusions, the District Court answered these questions in favor of plaintiffs. We think this answer was correct.

The Air National Guard of Maryland is part of the State Militia referred to in Article I, Sec. 8, of the Constitution. Congress is there empowered "to provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States. * * *" Clause 16 of Sec. 8. Article I reserves to the States the appointment of the officers and the authority of training the Militia according to the discipline prescribed by Congress. At all times relevant to this case the Maryland Air National Guard had not been called into the actual service of the United States.

In order to improve the national defense Congress has extensively legislated and appropriated funds with respect to the Militia, which is organized, equipped and disciplined in accordance with Federal standards, though trained and officered by the States. Important equipment is supplied by the United States. The airplane operated by Captain McCoy when this acci-

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or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

dent occurred was owned by the United States. 32 U.S.C. § 710(a). It had been allocated by the United States to the Maryland Air National Guard. It was maintained by personnel paid by the United States for that purpose, known as civilian air technicians, and also known as caretakers.

Captain McCoy was paid by the United States pursuant to 32 U.S.C. § 709(a), "to care for" this property. This pay was in addition to his National Guard compensation. See 32 U.S.C. § 709(b). The United States fixed the salary of those authorized to be "employed" as was Captain McCoy. 32 U.S.C. § 709(f) (Supp. 1962). Air Force regulations recognize this basic authority for the employment of civilian personnel. Employment under this authority is delegated to state adjutant generals, "subject to the provisions of law and such instructions as may be subsequently issued" under United States authority. Air National Guard Regulation No. 40-01, 20 Dec. 1954. The exercise of this authority is manifested by the Air National Guard Civilian Personnel Manual, issued 1 March 1958 "By Order of the Secretary of the Air Force" of the United States. The Manual prescribes *inter alia* the duties of civilian personnel in the Air National Guard in the situation of Captain McCoy. It also describes the qualifications, duties and responsibilities of positions which include those of "maintenance supervisor" and "aircraft maintenance chief."

Captain McCoy was also an officer of the National Guard of Maryland, commissioned by the Governor. He was assigned to 104th Fighter-Interceptor Squadron of the Maryland Air National Guard as "aircraft maintenance officer." This was in addition to his civilian job as "base maintenance supervisor" or "aircraft maintenance chief." Among his responsibilities

was that of flight-testing of aircraft. This was accomplished by flights called "proficiency flights" which, however, had multiple purposes, including evaluation of maintenance of the equipment, which was a responsibility of Captain McCoy in his employment under 32 U.S.C. § 709.* At the time of the flight that ended in this accident, which occurred on a Tuesday, Captain McCoy's pay status was that of an air technician, a status he bore throughout his normal work period of from eight a.m. to 4:30 o'clock p.m. during the week days. He was actually paid the day of the accident as an air technician, and such pay continued during his disability following the accident.

On this particular flight Captain McCoy was accompanied by the passenger who lost his life. This passenger was interested in joining the Air National Guard and in obtaining flight training. Captain McCoy indicated this to the Commander of the 104th Squadron, who concurred that the passenger could accompany Captain McCoy on the flight. The Commander gave permission for the flight. He explained the reasons for doing so as follows:

> A. The general reason for any flight of that nature is proficiency. You don't set up a flight for the express purpose of taking any individual up, the express purpose for flying is for your own general proficiency. If there is a seat available and the man qualifies in accordance with the regulations, it is permissible to take him up on that flight. The Air Force does it all the time.
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> Q. Were there other reasons for the flight in question? A. I think as I mentioned before a

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*It appears that flying these planes involved both a military and a civilian check on the plane's maintenance because of Captain McCoy's dual role, although it also appears that only personnel militarily qualified are permitted to fly the planes and that military pay can be awarded for such flying.

third reason for any flight is to insure that the equipment is in proper working order, to—well, as a result of each flight the maintenance officer takes, he has to fill out a form, whether the aircraft was okay, or whether it had even minor discrepancies which would be listed in the form. When he lands and comes back from the flight, this is done; so there is a third reason for the flight, which is to insure the proper maintenance of the equipment which he has general supervision over.

Q. As an aircraft technician? A. As an aircraft maintenance officer in the squadron and also as an air technician.

We hold with the District Court that in his civilian capacity as a caretaker of property of the United States Captain McCoy when on this flight, which entailed the performance of his caretaker and maintenance duties, was an employee of the United States within the terms of the Federal Tort Claims Act. See *United States* v. *Holly*, 192 F. 2d 221 (10th Cir. 1951); *Elmo* v. *United States*, 197 F. 2d 230 (5th Cir. 1952); *United States* v. *Duncan*, 197 F. 2d 233 (5th Cir. 1952); *Courtney* v. *United States*, 230 F. 2d 112 (2d Cir. 1956); *United States* v. *Wendt*, 242 F. 2d 854 (9th Cir. 1957).[3] He was so employed to assist the

[3] But see also the later case of *Pattno* v. *United States*, 311 F. 2d 604 (10th Cir. 1962), *cert. denied*, —— U.S. —— (1963), where the caretaker was held not within the Federal Tort Claims Act, the court concluding that when the accident occurred he was flying on a training program to evaluate the skill of another. We think this case distinguishable from the present case on the findings of the District Court, supported by the evidence, that the flight was within the caretaker function when the accident occurred.

In *Storer Broadcasting Co.* v. *United States*, 251 F. 2d 268 (5th Cir. 1958), the court said the only question presented was whether a member of the National Guard "who is not a

National Guard, but also to assist the United States. In his property maintenance function he was paid by, and the ultimate right of control over him was in, the United States. The functions lodged by the United States in the State Adjutant General did not serve to supplant this right of control in the United States, though it may be said to have been ancillary thereto. Such supervision as was lodged in the State did not make Captain McCoy an employee of Maryland. A foreman, for example, is not the employer of the one whose work he may in some respects supervise. There is of course a close relationship between the State of Maryland and the United States in the maintenance of federal property allocated to the Maryland National Guard, but this does not tip the balance toward the State on the issue of employment; for too much begins and remains with the United States in the case of these caretakers of federal property.

Perhaps the status of Captain McCoy can be described as an employment divided between Maryland and the United States, varying in relative amounts at different times and in different circumstances. But in an ultimate sense the right of control was in the Federal Government at the time and in the circumstances of this accident, notwithstanding immediate authority or permission for the flight was given by the State through its militia officers. While such personnel are not within the Federal Civil Service the Federal Bureau of Employees' Compensation of the Department of Labor considers them to be federal employees entitled to compensation benefits under the Act it administers.

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caretaker" and not in the active service of the United States is an "employee of the Government" within the meaning of the Federal Tort Claims Act.

The United States contends that Congress, since the events in this case, has rejected the effort to extend the coverage of the Federal Tort Claims Act to members and civilian employees of the National Guard. Reliance for this contention is placed upon 74 Stat. 878 (1960), 32 U.S.C. § 715 (Supp. 1962) and its history, including H.R. Rep. No. 1928, and S. Rep. No. 1502, 86th Cong., 2d Sess. (1960). We can by no means agree with this contention insofar as it bears upon the status of persons employed as civilians under 32 U.S.C. § 709. The Government's reference in its brief to the statement in the letter of the Deputy Attorney General to the Chairman of the Senate Committee on the Judiciary, set forth in the Senate Report, "To divorce responsibility from control is to forego any rational legal basis for payment," clearly misses the significance of the position of the Deputy Attorney General insofar as the present case is concerned. The thrust of his objection to the proposed legislation, S. 1764, 86th Cong., 2d Sess. (1960), which would have amended the Tort Claims Act as to both classes of persons, was that it would change existing law as to federal liability for acts of Guardsmen when on regular training duty under State control. As to the provision expressly including civilian caretakers under the term "employees of the Government," his position was that it was unnecessary because it would merely restate existing law.[4]

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[4] As to federalized National Guardsmen and Section 709 employees the Deputy Attorney General stated:

"The same rationale that looks to the controlling organization holds that when National Guardsmen are actually under the control, in whole or in part, of regular Army or Air Force officers or other Federal personnel, the Government is liable for their negligence. In such instances, however, the proposed legislation would be unnecessary for the Government's respon-

This distinction between members of the National Guard and men employed pursuant to Section 709 appears also in the *Hearings Before Subcommittee No. 2 of the House Committee on the Judiciary*, 86th Cong., 2d Sess. Ser. 22 (1960), where the First Assistant, Civil Division, Department of Justice, with reference to Section 709 employees, made a statement in terms identical to those used by the Deputy Attorney General. *Id.* at 6 and 7. See note 4, *supra*.

The new statute, 74 Stat. 878, 32 U.S.C. § 715 (Supp. 1962), though not adding to the coverage of the Tort Claims Act, creates authority in the Secretaries of the Army and Air Force to settle claims up to $5,000 arising out of National Guard activity even when the active agent is performing routine National Guard work under State control. And the active agent may be a Guardsman or a civilian employed under 32 U.S.C. § 709. Thus in one respect claimants are now in a better position than they were prior to passage of 74 Stat. 878 in 1960, in that they may successfully present their claims arising out of ordinary Guard activity such as training when the actor has been a Guardsman even though such per-

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sibility already exists under the present provisions of the Federal Tort Claims Act.

"The provision which would expressly include within the definition of 'employee of Government' civilian employees of the National Guard who perform caretaker functions with respect to the National Guard's military equipment, and are separately paid for such services under title 32, United States Code, section 709, is also unnecessary and thus objectionable, for the same reason. For it has already been held under the principles we have discussed in an unbroken series of court decisions that, because of the control relationship between such persons and the Federal Government (and its property), the latter is responsible for their torts under the present provisions of the Federal Tort Claims Act."

Senate Report, *supra* at p. 11.

sons are not under federal control at the time. With respect to injuries caused by civilians employed under § 709 it would seem that the new statute creates a limited administrative recovery as an alternative to the traditional judicial one under the Federal Tort Claims Act.[5] However that may be, it is clear that as of the time here in question, 1958, the plaintiffs' remedy for injuries caused by civilian caretakers was under the Federal Tort Claims Act; and the history of this

[5] In reporting the bill out which became 74 Stat. 878, and not the one originally proposed, the Chairman of the Senate Committee on the Judiciary, Senator Eastland, commented that administrative coverage was being given to claims arising out of injuries caused by Guardsmen since when in a non-federal status they had been held not to be employees of the United States within the meaning of the Federal Tort Claims Act. No such explicit comment was made with reference to § 709 civilians, although the Senator appended to his report a letter from the Secretary of the Army which acknowledged that the Courts of Appeals had held that injuries caused by these caretakers were cognizable under the Federal Tort Claims Act since those employed under authority of § 709 were "employees of the Government" within the meaning of that Act. See S. Rep. No. 1502, 86th Cong., 2d Sess. 306 (1960). The Secretary cited these cases on the point: *Holly* v. *United States*, *Elmo* v. *United States*, *Courtney* v. *United States*, and *United States* v. *Wendt*, all *supra* at p. 6. And he went on to say that the view reflected in these cases was at variance with the position of the Comptroller General but that the Supreme Court had not considered the matter, thus giving rise to an uncertainty, in the view of the Secretary, as to the status of such employees under the Tort Claims Act. But the Secretary was quite certain that Guardsmen in a non-federal status were not covered since it had been so held, citing *McCranie* v. *United States*, 199 F. 2d 581 (5th Cir. 1952), so that an administrative remedy was thought desirable—if any there was to be—instead of imposing a new kind of liability on the United States under the Tort Claims Act wherein liability is based upon *respondeat superior*. S. Rep. No. 1502, *supra*, at 6–7.

subsequent legislation supports this view. The fact that this caretaker was also an officer of the National Guard with other duties in that respect did not remove him from the federal employee status while he was actually performing the duties incident to that status.

Not only was the Captain an employee of the United States but he was also "acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law",* of Maryland where the negligence occurred. A private person in Maryland is liable for the negligence of his servant in the circumstances set forth in *Keitz* v. *National Paving & Contracting Co.*, 214 Md. 479, 491, 134 A. 2d 296, 301 (1957):

> [T]here are at least five criteria that may be considered in determining the question whether the relationship of master and servant exists. These are: (1) the selection and engagement of the servant, (2) the payment of wages, (3) the power to discharge, (4) the power to control the servant's conduct, (5) and whether the work is a part of the regular business of the employer. Standing alone, none of these *indicia*, excepting (4), seem controlling in the determination as to whether such relationship exists. The decisive test in determining whether the relation of master and servant exists is whether the employer has the *right to control and direct the servant in the performance of his work and in the manner in which the work is to be done*. It will be noted from the above, it is not the manner in which the alleged master actually exercised his authority to control and direct the action of the servant which controls, but it is his *right* to do so that is important. Sun Cab Co. v. Powell, 196 Md.

*28 U.S.C. § 1346(b).

572, 578, 77 A.2d 783 * * *. [Emphasis in the original.]

The emphasis here is on the right of control, which, as we have seen, was in the United States, notwithstanding the particular flight could be said to have been under some supervision by the State as to its timing in relation to other activities at the airfield.

Since there is no question on the appeal as to the finding of negligence by Captain McCoy, nor of the amount of damages awarded to the individual plaintiffs, the judgments for the latter will be affirmed.

There remains the contention of the United States that the judgment of $1,210,000 awarded to Capital Airlines, Inc., due to complete demolishment of its airplane, was excessive. The court arrived at this amount because of its view that the evidence showed Capital could make itself whole only by purchasing a new airplane of the same type, no used airplanes of the type being available, and the evidence showed that a new plane would cost $1,210,000.[7]

The original cost of the plane was $1,074,020 in January 1956. It had been in service for over two years when it was destroyed and was then about ready for overhaul. The evidence shows that some other airplanes, of a different version of the Viscount, had been sold when about two years old by Capital for several hundred thousand dollars less, per plane, than their original cost when new. And the record also shows that the destroyed airplane was carried on Capital's books at a depreciated value of some three hundred thousand dollars less than original cost. The trial court, as we have indicated, was more impressed by the fact that a replacement aircraft for the one

[7] The judgment was for $1,216,050, the difference of $6,050 being expense incurred by Capital, as to which item separately considered no objection is made.

lost could only be had from the makers, so that "new" price would have to be paid if an identical substitute were to be obtained. It is clear then that what was awarded was replacement value and not fair market value.

In the usual case—and we think Maryland is in accord—courts seek to compensate an injured party for its loss caused by the fault of another; and the loss in personalty is in terms of value at the time of the loss. An objective measure of value is usually meant, in other words what a willing buyer would have paid a willing seller in an arm's length transaction for the article in question just before it was lost, or, in other words, market value. *United States* v. *Toronto Nav. Co.*, 338 U.S. 396 (1949); *Boston Iron & Metal Co.* v. *S.S. Winding Gulf*, 85 F. Supp. 806 (D. Md. 1949); *Bailey* v. *Ford*, 151 Md. 664, 135 Atl. 835 (1927); *McCormick on Damages* § 44 (1935); 73 A.L.R. 2d 722 (1960).

Sometimes fair market value cannot be determined, or would be inadequate, as when, for example, the article destroyed was unique or possessed qualities the special nature of which could only be appreciated by the owner. In such a case additional principles are helpful in determining proper compensation to the injured party. See *McCormick*, *supra*, § 45. In the case before us, however, both parties agree that the proper measure to be applied is fair market value. And replacement value—however probative it may or may not be in establishing market value—is not the equivalent of market value. *Cf. Bailey* v. *Ford*, *supra*; *C. & P. Telephone Co.* v. *Public Service Comm'n.*, 201 Md. 170, 93 A. 2d 249 (1952).

There was evidence from which the trial court could have found the fair market value of the airplane at the time of its destruction. Accordingly, the conclu-

sion that Capital was entitled to replacement value was erroneous and must be reversed. On remand new findings on this aspect of the case may be made consistent with this opinion, with privilege to the parties of adducing additional evidence if the court in its discretion permits.

Judge Danaher is of the opinion, however, that the evidence sustains the trial court's conclusion as to damages to Capital, deeming the situation here presented to be unique, and that we should not hold that the trial court should not have found as it did as to Capital's damages.

Nos. 16953 and 16954 affirmed;
No. 16955 reversed and remanded.

United States Court of Appeals for the District of Columbia Circuit

SEPTEMBER TERM, 1962

Filed June 13, 1963

No. 16953

Civil 1236–59

UNITED STATES OF AMERICA, APPELLANT.

v.

STATE OF MARYLAND, FOR THE USE OF MARY JANE MEYER, ET AL., APPELLEES

No. 16954

Civil 1237–59

UNITED STATES OF AMERICA, APPELLANT

v.

STATE OF MARYLAND, FOR THE USE OF VANCE LEWMAN BRADY, WIDOW, ET AL., APPELLEES

No. 16955

Civil 1238–59

UNITED STATES OF AMERICA, APPELLANT

v.

CAPITAL AIRLINES, INC., A CORPORATION, APPELLEE

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: FAHY, DANAHER and BURGER, Circuit Judges

JUDGMENT

These cases came on to be heard on the record on appeals from the United States District Court for the District of Columbia, and were argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that:

(1) The portion of the judgment of the District Court on appeal in Nos. 16953 and 16954 is affirmed; and

(2) The portion of the judgment of the District Court on appeal in No. 16955 is reversed, and this case is hereby remanded to the District Court for further proceedings consistent with the opinion of this court.

Per *Circuit Judge* FAHY.

Dated: June 13, 1963.

Circuit Judge Danaher would affirm No. 16955 and accordingly dissents from the court's reversal and remand of that case.

APPENDIX B

Legislative Developments Concerning Civilian Employees of the National Guard

There were civilian employees of the militia long before Congress authorized the use of federal funds for their pay.[1] Although Congress provided federal arms and equipment for the militia virtually from the country's beginning,[2] it was not until early in this century that it began to appropriate funds for the compensation of Guard members and civilian employees. In 1908, soon after the States were empowered to use federal funds for paying military trainees (Sec. 14, Act of January 21, 1903, 32 Stat. 777; 10 Comp. Dec. 227, 228), they were given authority to use such funds for the compensation of Guardsmen in civilian capacities (14 Comp. Dec. 631).

The so-called caretaker statute (32 U.S.C. 709) was adopted as Sec. 90 of the National Defense Act

[1] For example, the Maryland statutes long authorized the employment of "armorers." Md. Rev. Code of 1878, Art. 18, §§ 28–33. Similar positions appear to have existed since colonial times. Act of Maryland General Assembly, Oct.–Nov. Sess., 1678, 7 Archives of Maryland (Md. Hist. Society 1889) 59. See, now, Md. Anno. Code, Art. 65, § 10.

[2] See Act of April 23, 1808, 2 Stat. 490. Previously, each member of the militia was apparently expected to furnish his own arms. Act of May 8, 1792, Sec. 1, 1 Stat. 271. Although Congress originally did not specify the ownership of such arms and equipment (R.S. § 1661) it provided, beginning in 1887, that they should remain the property of the United States, but that the States would be charged with the responsibility of caring for them. Act of Feb. 12, 1887, 24 Stat. 401. See 32 U.S.C. 105(a)(1), 702 (a) and (d), and 710(c).

of 1916.[3] That Act reshaped the National Guard into its present form, providing for the allotment of federal funds to the States for the supplies, equipment, and salaries of the Guard on condition that the States adhere to the discipline and standards prescribed by the federal government. Originally, "the men to be compensated" were enlisted men of the battery or troop, "detailed by the battery or troop commander." 39 Stat. 205–206. Since these men were to be selected by their commanding officer (a State official), and the maintenance and care of the property were the function and responsibility of the State (Secs. 82–89 of the National Defense Act, 39 Stat. 203–205, now found at 32 U.S.C. 702(d), 710 (b)), it would seem clear that they were to be State employees in their civilian (caretaker) capacity, as well as in their military status.

Although Section 90 was amended several times in the two decades following its enactment, the basic relationships remained unchanged. Two of the amendments are pertinent to the problem presented here. In 1926 Congress authorized, for the first time, the compensation of National Guard officers for full time civilian employment. Act of May 28, 1926, ch. 417, § 1, 44 Stat. 673, 32 U.S.C. 709(d). The authorization was limited to air squadrons, and to one officer per squadron. The purposes of the amendment were (a) to secure the more efficient maintenance and care of airplanes, and (b) to provide "an officer constantly on duty * * * for the supervision of flying training." H. Rep. No. 1031, 69th Cong., 1st Sess., p. 3; Sen. Rep. 785, 69th Cong., 1st Sess., p. 1. Thus, the first officers of the State National Guard to occupy a civilian "caretaker" or air technician status were to perform in that capacity a function (conduct of training)

[3] 39 Stat. 166.

reserved to the States by the Constitution (Art. I, Sec. 8, cl. 16) and by statute (Section 91 of the National Defense Act of 1916, 39 Stat. 206, now 32 U.S.C. 501(b). Nothing in the statute or legislative history indicates that Congress intended this State function to be performed by a federal employee. It therefore seems clear that in 1926, as in 1916, Congress considered the members of the National Guard "detailed" for caretaker employment by their organization commander to be full-time civilian employees of the State, and not the federal government.

The statutory provision that the "caretakers" were to be "detailed" by the commander of the organization having custody of the equipment restricted their selection and efficient use. Accordingly, in 1935 Congress (at the request of the National Guard Association and the adjutants general of the States) authorized the pooling of caretakers by providing that the Secretary designate "by whom they shall be employed." Act of June 19, 1935, ch. 277, 49 Stat. 391, 392. The legislative history shows clearly that Congress used that language merely to allow the Secretary to designate which State officials should employ the caretakers. The committee reports make this intention clear (Sen. Rep. 635, 74th Cong., 1st Sess., pp. 2–3):

> Section 6 of S. 2710 will authorize the pooling of National Guard caretakers. Under present law *States* are required to select the caretakers from the units that have the material. Section 6 will permit the handling under the adjutant general or other proper State *official* of the caretakers as a pool. * * * [Emphasis added.]

Nothing in the legislative history supports the view that the Secretary was given authority to authorize their employment by a federal official, or in any other way to treat them as federal employees. Interventing

administrative decisions were to the same effect, i.e., 21 Comp. Gen. Dec. 305.

Although the statute remained unchanged, beginning in 1946 the statutory restriction that only one officer be employed per squadron was in effect lifted when the Secretary was authorized in the Appropriations Act to use federal funds to support the employment of as many caretakers as he "deemed necessary." Act of July 16, 1946, ch. 583, § 1, 60 Stat. 556. Subsequent appropriation acts contained similar provisions. See Historical Note, 32 U.S.C., pp. 5768-9.

The testimony before the Appropriations Committees in support of the appropriation of federal funds for the National Guard air technician program is to the same effect, consistently characterizing such persons as civilian employees of the respective States. For example, General Wilson, the ranking air officer of the National Guard Bureau, gave the following thumbnail description of the air technician program (Volume 4, Hearings before the Subcommittee of the House Appropriation Committee, 84th Cong., 2d Sess., relative to the Department of the Air Force appropriation for fiscal 1957 (p. 1303)):

> Our full-time employees, which we call air technicians, are the backbone of our organization. They serve in a dual capacity; as military members of the Air National Guard and as civilian employees of their respective States. * * *

To the same effect, see Hearings, *supra*, at pp. 98-99. With this understanding of the air technician's status as a State employee, Congress annually passed appropriation bills which authorized the use of federal funds for as many officer air technicians as the Secretary of the Air Force deemed advisable. E.g., Pub. L. 85-117, Aug. 2, 1957, title V, 501, 71 Stat. 322

Act of July 2, 1956, ch. 488, title V, § 501, 70 Stat. 466. See Historical Note, 32 U.S.C., pp. 5768–69.

Despite the decisions of appellate courts that employees receiving pay pursuant to the caretaker statute are federal employees (see fn. 15, *supra*, p. 17), Congress has repeatedly rejected this characterization and enacted legislation treating them as employees of the States. For example, in 1954 Congress established a separate coverage group under the Social Security Act for "[c]ivilian employees of National Guard units of a State who are employed pursuant to section 90," since "[t]he Department of Defense does not regard these employees as Federal employees." Act of Sept. 1, 1954, 68 Stat. 1059, amending 42 U.S.C. 418(b)(5); H. Rep. 1698, 83d Cong., 2d Sess., p. 50; Sen. Rep. 1987, 83d Cong., 2d Sess., pp. 45–46. Similarly, in 1956 Congress authorized federal disbursing officers to make payroll deductions for such employees for State retirement programs, noting that "These employees, although paid from Federal funds, are considered to be State rather than Federal employees." Act of June 15, 1956, 70 Stat. 283, 5 U.S.C. 84d; Sen. Rep. 2045, 84th Cong., 2d Sess., p. 1. Accord: Pub. L. 87–224, Sept. 13, 1961, 75 Stat. 496, 5 U.S.C. (*Supp. IV*) 84d and 32 U.S.C. (*Supp. IV*) 709(f) (concerning federal contribution to State retirement funds); H. Rep. 786, Sen. Rep. 709, 87th Cong., 1st Sess.

A recent legislative development demonstrates the continuing congressional understanding that National Guard personnel are employees of the State in their civilian, as well as their military, capacity. In 1960, a bill was introduced, with the backing of the National Guard Association, which would have extended the coverage of the Tort Claims Act to make the United States liable for the negligence of both civilian em-

ployees and military members of the National Guard.[4] The Department of the Army (acting for the Defense Department) and the Department of Justice opposed the bill, chiefly on the ground that, since there was no federal control over the National Guard (except when in federal service), the federal government should not be held accountable for the torts of Guard members and employees. H. Rep. 1928, 86th Cong., 2d Sess., p. 7; Sen. Rep. 1502, 86th Cong., 2d Sess., pp. 8, 11. In addition, the Department of Justice opposed the provision in regard to civilian employees on the ground that the *Holly* line of cases already provided for relief.[5] The Secretary of the Army, however, in a letter to Representative Celler, Chairman of the House Judiciary Committee, pointed out that since the view expressed by the federal courts in *Holly* and other cases was at variance with the long-standing administrative interpretation of the Comptroller General, and since this Court had not considered the question, there was "uncertainty" as to the status of such employees with respect to coverage by the Tort Claims Act. The Secretary went on to recommend that, instead of extending the reach of the Tort Claims Act, Congress should provide a limited administrative remedy for claimants injured by negligent conduct of National Guard members. H. Rep. 1928, *supra*, p. 6.

Congress refused to modify the scope of the Tort Claims Act. Instead, adopting the recommendation of the Department of the Army, it established a limited administrative remedy for injuries caused by civilian employees, as well as military members of the Guard. Pub. L. 86–740, 32 U.S.C. (Supp. II) 715. In effect, the amendment authorized the Secre-

[4] Hearings on H.R. 5435 and 9315, before the House Judiciary Committee, 86th Cong., 2d Sess., p. 12.

[5] Sen. Rep. 1502, 86th Cong., 2d Sess.

tary of the Army or Air Force to settle claims against the United States up to an amount of $5,000, and to certify claims in excess of that amount to Congress, for payment. The Senate Committee explained its refusal to expand the coverage of the Tort Claims Act in the following terms (Sen. Rep. 1502, 86th Cong., 2d Sess., p. 4):

> The crux of this matter lies in the fact that the National Guard is primarily under State control, as opposed to Federal control. * * *

Similarly, the House Committee believed that it would be "unwise to extend the coverage" of the Act to include conduct of civilian and military members of the Guard, since "Federal authorities do not have command and control over National Guard units and members not in active Federal service." H. Rep. 1928, 86th Cong., 2d Sess., p. 4.

In declining to widen the coverage of the Tort Claims Act, Congress ratified the line of cases holding that members of the National Guard acting in a military capacity are not federal employees. It did not, however, approve the *Holly* line of decisions holding the contrary with respect to civilian employees. On the contrary, in providing an administrative remedy for the torts of Guard members performing civilian, as well as military, duties, Congress impliedly rejected the contention of the Department of Justice that those decisions rendered legislation unnecessary and accepted the Defense Department's view that there was "uncertainty" as to the status of "caretakers and clerks." 106 Cong. Rec. 18383. And in according the same treatment to military and civilian personnel, it necessarily rejected the distinction upon which the *Holly* line of decisions was based.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 543

UNITED STATES OF AMERICA, *Petitioner*

v.

STATE OF MARYLAND, for the use of MARY JANE MEYER, et al., *Respondent*

UNITED STATES OF AMERICA, *Petitioner*

v.

STATE OF MARYLAND, for the use of VANCE LEWMAN BRADY, et al., *Respondent*

UNITED STATES OF AMERICA, *Petitioner*

v.

CAPITAL AIRLINES, INC., *Respondent*

On Petition For a Writ of Certiorari to the United States Court of Appeals For the District of Columbia Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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---

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court on the issue of agency are fully set

forth at J.A.[1] 679-688. The memorandum opinion of the District Court on the agency issue appears at J.A. 679. The opinion of the District Court on negligence appears at J.A. 725-728, and on damages at J.A. 789, 790 and 844. The conclusions of law by the District Court on the negligence issue appear at J.A. 853, as do that Court's findings of fact with reference to Capital Airline's damage. The judgment orders appear at J.A. 855, 856.

The opinion of the United States Court of Appeals for the District of Columbia Circuit is fully and correctly set forth in Petition, Appendix A, pages 1a-14a, and is reported at 322 F.2d 1009.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Is a person who is employed on a full-time basis under the provisions of 32 U.S.C. § 709(a), as a caretaker of federal property, an employee of the United States under the provisions of the Federal Tort Claims Act?

2. If a person so employed is an employee of the United States, then, did the United States have sufficient right to control him at the time of the occurrence so that the United States, if a private person, under the respondeat superior law of Maryland, would be liable for his negligence under the Federal Tort Claims Act?

---

[1] J.A. references are to the Joint Appendix filed in the Court of Appeals and in this Court.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Federal Tort Claims Act, Title 28, Sec. 1346, U. S. Code, and the National Defense Act of 1916 (39 Stat. 166) as amended, Title 32, Sec. 709, U. S. Code, are set forth in the Petition, at pages 3-4.

There are additional pertinent parts of regulations which will be found in the Appendix of this brief. These are the following:

Plaintiff's Exhibit No. 15, National Guard Regulations No. 75-16,

Plaintiff's Exhibit No. 16, National Guard Regulations No. 75-16, Superseded.

Plaintiff's Exhibit No. 17, ANGR 40-01.

Plaintiff's Exhibit No. 8, ANGM 40-01, Air National Guard Manual.

Defendant's Exhibit No. 7, AFR 45-2.

Defendant's Exhibit No. 9, ANGR 50-01.

Additionally the following statutes are contained in the Appendix:

5 United States Code 751:

Article 1A, sec. 10, Maryland Annotated Code 1951.

STATEMENT

The cases were tried in the United States District Court for the District of Columbia in two different stages. First, a trial was had on the question whether the maintenance supervisor (caretaker), flying the United States owned jet aircraft was an employee of the United States, acting in the scope of that employment within the purview of the Federal Tort Claims

Act, at the time of the occurrence (J.A. 12, 689). This issue was resolved in favor of Respondents (J.A. 687-688). Thereafter, a second trial was had in the same court on the remaining issues of negligence and damages (J.A. 689, 692), and the lower court found for Respondents on those issues (J.A. 727-728). Subsequently, the United States Court of Appeals for the District of Columbia Circuit, affirmed on all issues except as to the value of the Capital Airlines plane destroyed in the accident.

As pointed out by Petitioner (Petition 12), the United States District Court for the Western District of Pennsylvania, on substantially the same record, has also found against the United States in two cases instituted against the government in behalf of the dependent next of kin of two passengers who were riding in the Capital Airlines airplane at the time of the fatal accident.[2] The detailed findings of the District Court in the instant case, as affirmed by the Court of Appeals, are based on the following evidence adduced at the trial.

a. The Occurrence

The actions arose out of a mid-air collision between a Capital Airlines Viscount Airliner and a T-33 jet airplane owned by the United States and allocated to the Maryland Air National Guard. The collision occurred on May 20, 1958, over the State of Maryland, while the Viscount was proceeding on a regularly scheduled commercial flight from Pittsburgh to Baltimore Friendship Airport on a civil airway. The T-33 airplane was being operated by one Julius R. McCoy

[2] *State of Maryland v. United States*, 200 F. Supp. 475 (W.D. Pa. 1961).

on a local area flight out of Martin Airport, Baltimore, Maryland.

b. The Employment Relationship

The United States provided the airplanes, paid the cost of the fuel used by all the airplanes allocated to the unit, including the T-33 airplane involved, provided all the equipment for the Guard Unit, paid the salaries of the civilian personnel to maintain said federal property, furnished the new and spare parts required for the said equipment, and made the major repairs needed by the T-33 airplane involved and the other planes allocated to the Guard Unit (J.A. 678; Dist. Ct. Finding 4).

On the date of the accident, McCoy was employed as a full-time civilian air technician under the provisions of 32 U.S.C. § 709(a), which provides for the employment of civilian caretakers of United States property (J.A. 81, 330). He was also a commissioned officer in the Air National Guard of the State of Maryland (J.A. 37-38, 41; Dist. Ct. Finding 5).

The National Guard Bureau is authorized to regulate employment and rates of compensation of civilian caretakers of federal property; Department of the Army General Order 96, dated November 9, 1951 (J.A. 214); 32 U.S.C. § 32 (which became 32 U.S.C. § 709 (a)).

Pursuant to 32 U.S.C. § 709(a), the Secretary of the Air Force, through the National Guard Bureau, promulgated Air National Guard Regulation 40-01, dated 20 December 1954 (hereinafter referred to as ANGR 40-01), which provided that the basic authority for employment of National Guard civilian personnel is contained in Section 90 of the National Defense Act,

as amended (which became 32 U.S.C. § 709(a)). This authority of the federal government to employ, fix rates of pay, establish work hours, supervise and discharge employees, within the purview of this regulation, was delegated by the Secretary of the Air Force to the Adjutants General of the several states, subject to provisions of law and such instructions as might be subsequently issued by the National Guard Bureau. ANGR 40-01 and Air National Guard Manual 40-01, designated the jobs in the air technician categories and prescribed the duties and requirements of the job and the prequisite training for such employment (J.A. 655-660; District Ct. Finding 6, Appendix, pp. 4a-20a).

Under the authority of ANGR 40-01, the National Guard Bureau promulgated Air National Guard Manual 40-01, dated 1 March, 1958 (hereinafter referred to as ANGM 40-01), which states that its provisions will govern all Air National Guard civilian employees (J.A. 211). Said manual further provides that the "authority of the National Guard Bureau to regulate the employment and rates of compensation is contained in Department of the Army General Order 96, dated 9 November, 1951, subject, 'Delegation of Authority for the Employment and Fixing of Salaries for All Caretakers and Clerks in the National Guard Bureau'" (J.A. 214; Dist. Ct. Finding 7, Appendix, p. 11a).

Air technicians such as McCoy are full-time civilian personnel who are placed at National Guard installations to maintain federal property and records, to the prescribed standards of the Air Force, that cannot be maintained by the normal personnel assigned to the Guard Units. In order to qualify as an air technician (caretaker) under the provisions of ANGR 40-01,

McCoy attended a nine month course for maintenance officers at the United States Air Force Base and Maintenance School at Chanute Air Force Base, Illinois (J.A. 42). He was required to attend the school at Chanute by order of the Secretary of the Air Force. While attending this school, he was paid by the United States Air Force finance office (J.A. 43; Dist. Ct. Finding 8).

At the time of the occurrence, in addition to carrying out his duties as Aircraft Maintenance Chief, McCoy was acting Maintenance Supervisor for the Base in the absence of Major Mitchell, who held this assignment but was away on a training program (J.A. 40, 48, 71; Dist. Ct. Finding 12).

In these positions McCoy was required to supervise the maintenance of twenty-eight aircraft, and of all other equipment allocated to the Maryland Air National Guard by the United States, in accordance with Air Force Regulations, and also to supervise the seventy-five to eighty civilian maintenance personnel who maintained the equipment (J.A. 37, 38, 40, 47, 68; Dist. Ct. Finding 13).

To insure that the unit operated the equipment in accordance with standards prescribed by the United States Air Force, an Air Force Adviser on active duty with the United States Air Force was stationed at Martin Field. If he were dissatisfied with the maintenance situation, the adviser would so report to the Air Force (J.A. 330; Dist. Ct. Finding 10). In addition, McCoy was required to submit monthly reports respecting the equipment to the National Guard Bureau (J.A. 43).

United States Air Force Inspection Teams made inspections to determine whether the air technicians were complying with the requirements of ANGR 40-01. These inspections were made annually to determine whether the technicians were qualified to continue to hold their jobs (J.A. 307; Dist. Ct. Finding 11).

If the United States found that a civilian employee of an Air National Guard Unit was not meeting the United States Air Force requirements, it could, in practical effect work his discharge by stopping his salary. (J.A. 335; Dist. Ct. Finding 11).

As an air technician, i.e., in his civilian capacity, McCoy was employed at the base during the normal work week from 8:00 A.M. to 4:30 P.M., Tuesday through Saturday, except for two Saturdays a month. On those two Saturdays, he was employed in his military status as an officer in the Air National Guard and as Squadron Maintenance Officer (J.A. 38; Dist. Ct. Finding 14).

McCoy, in his full-time air technician job, was paid an annual salary in the sum of $7,500.00, by check drawn on the United States. Additionally, he was paid approximately $2,000.00 per year by the United States, for his part-time military duties (J.A. 41; Dist. Ct. Finding 24).

c. Purposes of the Flight By McCoy On the Day of the Occurrence

On the morning of Tuesday, May 20, 1958, a day during which he normally worked in his civilian capacity as an air technician, McCoy reported to the base and commenced work at the usual starting time on his full-time civilian caretaker job as aircraft maintenance chief (J.A. 67, 68; Dist. Ct. Finding 27), and as

acting maintenance supervisor in Major Mitchell's absence (J.A. 77-78; Dist. Ct. Finding 12). Before the flight, he performed certain daily administrative duties to establish the order of business for the day. This work included the determination of which aircraft would be maintained and gotten ready for flight or repair, if necessary, and the work assignments of various individuals (J.A. 67, 78). At the time of the occurrence, McCoy was flying in his civilian capacity as a caretaker of government property (J.A. 80; Dist. Ct. Finding 35). On the day of the occurrence, he was recorded as present at the base in his civilian capacity, was carried on the roster in his air technician pay status, and was paid by the United States Treasurer in this capacity (J.A. 77-78; Dist. Ct. Finding 27).

McCoy's status as acting maintenance supervisor, and aircraft maintenance chief made it desirable for him to make frequent aerial flights (J.A. 58, 59, 70-71, 81, 164, 306, 605-606). This was an important facet of his civilian work in maintenance (J.A. 75-77, 79, 164). As an air technician-aircraft maintenance supervisor, one reason for this flight or any flight that he made on this job was to insure the proper maintenance of the equipment over which he had general supervision (J.A. 69, 75-76). While flying he could better observe from the air (a) obstructions that might be on the runway; (b) exposed lips of runways that might cause an accident; (c) foreign object damage; (d) cleanliness of his ramp (a piece of wire on the runway or ramp can be sucked into and ruin a $100,000.00 jet engine); (e) condition of the airport; (f) efficiency of the tower personnel; and (g) whether the maintenance people are in front of the intake scoop when

the aircraft is parked, and whether they are waiting until the plane stops before they insert the chocks (J.A. 140). McCoy as Maintenance Supervisor, in the course of each flight, by the very nature of his function and duty, would be observing the product he was required to maintain for better maintenance, safer aircraft, etc. (J.A 164). In short, whenever he flew he could get a better appreciation of the way the people under his supervision were doing their job. (Dist. Ct. Finding 21).

While the job description of the aircraft maintenance chief's position set forth in the civilian personnel manual, ANGM 40-01, contains no requirement that the holder of the position be a pilot or that he fly aircraft, the job description for the position of maintenance supervisor provides that it is "desirable" that the incumbent be a rated pilot on flying status to enable him to "make test flights on assigned aircraft" (J.A. 217; Dist. Ct. Finding 19, Appendix 17a). It is desirable for the maintenance officer to have a flying status to better understand the quality of the maintenance and the condition of the equipment (Dist. Ct. Findings 17, 18, 19 and 20). General Wilson, head of the federal agency responsible for the promulgation of ANGM 40-01, and Kilkowski, McCoy's immediate superior in his civilian technician job, both testified it was desirable for the head of the maintenance section to have a flying status, as the equipment can only be properly evaluated by flying it, and his flying the planes would give the other pilots a safer feeling because they would know that the person maintaining the plane was also flying it. Such flights by the maintenance supervisor would make for better maintenance, safer aircraft, and as a result, a better unit (J.A. 164). It was also part

of McCoy's duties in his air technician civilian job to fly functional check flights (J.A. 75-77, 79, 81; Dist. Ct. Finding 21).

McCoy also flew the airplanes to satisfy the requirements of Air Force Regulations (AFR 60-2) and to increase his pilot rating. Since he had to maintain proficiency as a pilot in order to be qualified and competent to perform these flights, even flying for proficiency related to McCoy's civilian job (Dist. Ct. Finding 21). During the course of the flight in question, McCoy checked the efficiency of the equipment and evaluated the quality of the maintenance (J.A. 162-164, 493-495; Dist. Ct. Finding 20, 22). He watched the instruments and observed that the plane was behaving properly. He likewise had a better opportunity to observe the quality of the maintenance by flying the plane. (J.A. 70, 399). The particular flight at the time of the accident was part of McCoy's function to maintain proficiency and maintain the equipment (Dist. Ct. Finding 23). It was not a training mission (J.A. 80, 121, 136, 146-47, 152-53, 161-63, 586-87). The uncontradicted evidence showed that the form used for this flight was the same one used for all flights regardless of the nature of the flight, so that this form would have been used in the case of flights made in connection with the maintenance of the plane. (J.A. 69). While it was necessary for a person to have a military pilot's rating in order to fly a United States military plane, a person flying a plane might be performing his civilian duties as McCoy was doing on the occasion in question, and as he had frequently done on prior occasions (J.A. 162-164). He could only occupy one pay status at a time, either that of a civilian caretaker in maintenance work, or that of a member of the Air National

Guard in a military capacity (J.A. 586-87); Dist. Ct. Finding 25). In May, 1958, at the time of the accident, McCoy had accumulated more than the number of hours for which he could earn flight pay under the provisions of AFR 60-2 for the period in question. His flight on May 20, 1958, therefore, was not to earn flight pay (J.A. 70, 135-36; Dist. Ct. Finding 26).

McCoy applied to Kilkowski for permission, and received it, to make the flight on May 20, 1958. Kilkowski, like McCoy, was a civilian employee and held the air technician position of base detachment commander; Kilkowski was also a member of the Maryland Air National Guard (Dist. Ct. Finding 15-16). The flight was termed a "proficiency flight." Proficiency flights have multiple purposes, including evaluation of maintenance of the equipment, which was a responsibility of McCoy in his employment under 32 U.S.C. Sec. 709(a) (Dist. Ct. Finding 21).

McCoy was accompanied on the flight in question by a passenger, Donald Chalmers, who was a member of the Maryland Army National Guard. Chalmers was required to sign a release prior to the flight, releasing the United States and the State of Maryland from any liability in the event of Chalmers injury or death during the flight because of "negligence, faulty pilotage, or structural failure of the aircraft." (Appendix A; Dist. Ct. Findings 16, 29).

d. Circumstances Subsequent To the Accident Establishing the Employment Relationship

Subsequent to the occurrence, McCoy received benefits under the provisions of the Federal Employees' Compensation Act, 5 U.S.C., § 751, which provides for payment of compensation by the United States to an

employee of the United States injured "while in the performance of his duty." The papers pertaining to McCoy's compensation claim were processed by Col. Ebaugh, United States Property and Fiscal Officer for the State of Maryland, a Federal employee. The forms needed for the claim were provided by the Department of Labor and used in all instances for Caretakers—Technicians (J.A. 240-241). Col. Ebaugh certified as follows:

> "I certify that Julius R. McCoy was working as a Civil Employee of the United States at the time of injury and *not* as a member of the Maryland National Guard:" (J.A. 228)

This certificate was required by the United States Department of Labor and Col. Ebaugh's investigation lead him to believe that he was justified in filling out this certification (J.A. 245).

The Bureau of Employees Compensation, Department of Labor, handled this case in the same manner as cases involving other employees of the United States Government. Its employees processed the claim of McCoy and adjudicated that he was in the performance of his duty as an employee of the United States at the time of the accident.

Subsequently, at the request of the United States, and pursuant to Statute, McCoy executed an assignment to the United States under the provisions of the Federal Employees' Compensation Act, of his rights of action against Capital Airlines and others and said assignment, prepared by the United States, stated that he was employed by the Department of the Air Force as an Aircraft Maintenance Chief (Pilot) at the time of the occurrence (J.A. 225-227). The Petitioner at no

time offered testimony to show that a mistake or error was made by either Col. Ebaugh or the Department of Labor.

(c) The Air National Guard

The overall purpose of the National Guard is to provide a pool of combat ready reserve forces to be used in case of a national emergency involving the defense of the United States; 32 U.S.C. Section 102.

The Air National Guard operates at large without regard to state boundaries. According to Standing Operating Procedure No. 3, promulgated January 2, 1957 (Defendant's Ex. 3) (J.A. 663-664), the local flying area for the 104th Fighter Interceptor Squadron over which flights were made daily by the squadron McCoy was a member of, included the States of Maryland, Pennsylvania, New Jersey, Delaware and Virginia. The squadron's overall training area was considered to be in the continental United States (Respondent's (Appellees') Circuit Court Brief Supplemental App. 2a).

The Air National Guard had some twenty-four wings of which seventy-three squadrons were equipped with jet fighters. All of these units had a D-Day mission with a major command in the Air Force (J.A. 321).

The 104th Fighter Interceptor Squadron was part of the air division at Andrews Air Force Base. As such, it had been given a D-day mission with the Air Defense Command in the role of fighter interceptor squadron for which it was trained and equipped. In case of emergency or requirement by the Air Force, the 104th was required to be able to get at least fifty percent of its aircraft fully armed in the air in the first hour. (J.A. 333)

SUMMARY OF ARGUMENT

There are no important or compelling reasons for granting the writ here. Two questions only, exist. The first requires a determination as to whether the maintenance-supervisor (caretaker) flying the plane was an employee of the United States, and the second whether he was acting within the scope of his employment under the applicable law of Maryland at the time of the accident. Actually, the decision below turns upon its own facts, and it will, contrary to petitioner's claim, affect only a relatively few persons. The United States is responsible here because the pilot of the plane, McCoy, was employed by it as a caretaker under the authority of 32 U.S.C., Section 709, and because at the time of the accident he was performing his civilian duties as maintenance supervisor or aircraft maintenance chief for the United States (which Petitioner concedes, Petition, p. 11). The United States is thus liable because if it were a private person it would be responsible to respondents in accordance with the law of Maryland.

The detailed findings of fact of the District Court demonstrate both the extent of control of the United States over McCoy and likewise its right to control.

The decision of the lower court does not conflict in any way with decisions of other Circuits. Both under the Federal and State law the decision here was correct.

ARGUMENT

1. There Is No Important Question of Federal Law Involved

Persons employed as "caretakers" of federal property under the provisions of 32 U.S.C. § 709(a) are employees of the United States within the purview of

the Federal Tort Claims Act. This employment relationship is determined by federal laws and regulations. Every court of appeals which has considered the question has held, by reason of the extent of control the United States has over caretakers, that caretakers are employees of the United States within the purview of the Federal Tort Claims Act. There is no conflict between the various courts of appeals on this issue, despite Petitioner's contention to the contrary.

Once the employer-employee relationship is established under federal law, the question whether the employee was acting within the scope of his employment under the Federal Tort Claims Act is determined under the law of the state where the negligence occurred; *Williams* v. *United States*, 350 U.S. 857 (1955). The test of "scope of employment" under the law of Maryland is the "right to control," *Keitz* v. *National Paving & Contracting Co.*, 214 Md. 479, 491, 134 A.2d 296, 301 (1957), and Petitioner admits there was no misapprehension as to the state law by the Court of Appeals in this case (Petition 22). Therefore, no supposed error in failing to correctly apply federal law in determining scope of employment can constitute any basis for granting the writ.

The first ground advanced by Petitioner for granting the writ is that the court of appeals decided incorrectly that a caretaker employed under 32 U.S.C. § 709(a) is an employee of the United States (Petition 17). All courts of appeals which have passed upon the question, have held that a caretaker employed under the provisions of that statute is an employee of the United States within the purview of the Federal Tort Claims Act; *United States* v. *Holly*, 192 F. 2d 221 (10th Cir.

1951); *Elmo* v. *United States*, 197 F. 2d 230 (5th Cir. 1952); *United States* v. *Duncan*, 197 F. 2d 233 (5th Cir. 1952); *Courtney* v. *United States*, 230 F. 2d 112 (2d Cir. 1956); *United States* v. *Wendt*, 242 F. 2d 854 (9th Cir. 1957); *Pattno* v. *United States*, 311 F. 2d 604 (10th Cir. 1962), cert. denied, 373 U.S. 911 (1963).

In each of the above cases, the court held that a federal statute creates the position of unit caretaker and outlines his duties generally; that the pay for his services is wholly from federal funds; that federal regulations define the duties and responsibilities of the caretaker in detail; that the Secretary of the Army (Air Force) fixes the maximum pay scales, and then delegates to the adjutant general of the state the task of setting actual rates of pay, within limits fixed by federal regulations; that the primary duties of caretakers are the care and maintenance of federal property allocated by the United States to the National Guard for military purposes; that the Secretary of the Army (Air Force) through the Chief of the National Guard Bureau and through the state adjutant general to whom certain powers have been delegated, has the full right to control the employment, work, and discharge of the caretaker; and that the federal government has the right to direct and control the method and means by which a caretaker performs his service.

These factors have satisfied all courts of appeals which have considered the question that the status of a caretaker as a civilian employee of the United States is clearly distinguishable from that of a military member of a non-activated National Guard Unit. Until it filed the present petition, the United States accepted the decisions of the courts of appeals and did not attempt to appeal therefrom.

Petitioner's contention that all of these decisions were erroneous and that this Court should grant the writ and hold that caretakers are not federal employees is contrary to the position of the Department of Justice as set forth by Deputy Attorney General Walsh, on May 23, 1960. At that time, Judge Walsh advised the Senate Committee on the Judiciary that legislation which would have amended the Federal Tort Claims Act, to expressly include caretakers as employees of the United States was unnecessary because "an unbroken series of court decisions" had held the Federal government was responsible for the torts of caretakers "because of the control relationship between such persons and the Federal Government." (Opinion of Court of Appeals, Petition, Appendix A, 8a, 9a, n; Hearings on S. 1764 before the Senate Committee on Judiciary 86th Congress, 2d Session (1960)).

Congress has had many opportunities, at the time of the passage of the Federal Tort Claims Act and subsequent thereto, to indicate that "caretakers" were state employees, if it chose to do so. It has several times amended this Act, but has remained silent as to "caretakers." Obviously, Congress did not intend to remove "caretakers" from their recognized federal status.

In 1960, more than two years after the occurrence complained of, Committees of the Senate and House of Representatives had under consideration but did not report out for passage, a bill to amend the Federal Tort Claims Act. This bill would have made the United States absolutely liable for the negligence of members of non-activated guard units and specifically defined "employees" to include "caretakers." Peti-

tioner contends (Petition 20, Appendix B, 21a-23a) that the fact these committees did not report out the bills for the consideration by the Senate and House is an indication that Congress agreed there was "uncertainty" as to the status of caretakers. And Petitioner further contends that by then providing a limited administrative remedy applicable both to members of the guard and civilian personnel, Congress rejected the *Holly* line of decisions (Petition, Appendix B, 23a). These contentions were carefully considered by the Court of Appeals (Petition, Appendix A, 8a, 9a), and were disposed of adversely to the Petitioner for compelling reasons.

The court noted that the Department of Justice through the Deputy Attorney General advised the Senate Committee that the amendment to expressly include civilian caretakers under the terms "employees of the Government" was "unnecessary" because it would merely restate existing law. And the court stated that the new limited administrative recovery was merely an alternative to the traditional judicial remedy under the Federal Tort Claims Act (a conclusion with which Petitioner apparently agrees (Petition 16)), and could not have any application to the remedy of the plaintiffs for the injuries and damages caused in 1958.

At the time the proposed amendment was under consideration, no action was taken by Congress to relieve the United States from liability for the negligence of caretakers under the Federal Tort Claims Act, although, as shown, its attention had been specifically called to the fact that the courts were uniformly holding that "caretakers" were employees of the United States under that Act.

Petitioner argues (Petition 15) that if the rule enunciated in the "caretaker" cases continues to be applied, it lays the federal government open to liability for the acts of nineteen per cent of the membership of the Air National Guard, since these nineteen per cent are civilian employees. The government does not indicate what percentage of these civilian employees are technicians, and nowhere indicates what portion of their time is spent in the scope of their federal employment. And the argument is completely unrealistic as can be seen by examining the situation at Martin Field Base where McCoy was stationed. Of approximately sixty-five civilian air technicians working at that base during the civilian work week, McCoy was the only officer maintenance supervisor stationed there who had authority to fly and test airplanes. If that ratio held true generally, it would be one sixty-fifth of nineteen per cent of the Air National Guard who might be in the position to operate the planes, for whose conduct the government would be liable during the time when the plane was being operated during the civilian work week by the civilian technician as part of his civilian job. But this, in any event, is beside the point. The government is only liable in these cases if the civilian technician is acting within the scope of his employment as a civilian technician and if he negligently causes harm to other persons. This is what Congress intended, and this is what the courts have held.

2. The Lower Courts Correctly Interpreted and Applied the Respondeat Superior Law of Maryland

As shown in the preceding section, the courts have consistently held that a caretaker employed under the provisions of 32 U.S.C. §709(a), is an employee of

the federal government. These decisions rest upon statutes and regulations which clearly show the broad extent of federal control over "caretakers" of United States property allocated for National Guard use.

It having been established that a "caretaker" employed under 32 U.S.C. Sec. 709(a) is an employee of the United States, then the question whether the employee was acting within the scope of his employment, at the time of the occurrence, so that the Federal Government, if a private person, would be liable to the claimant is answered by a consideration of the evidence under the applicable law of Maryland, the place where the negligence occurred; *Williams* v. *United States*, 350 U.S. 857 (1955).

It is clear under Maryland law that a person may be an employee of two employers for a given act. *Keitz* v. *National Paving & Contracting Company*, 214 Md. 479, 134 A 2d 296 (1957).

A fair analysis of the evidence discloses that McCoy was flying either solely in his civilian air technician status or in a dual capacity of a military pilot (because he needed the pilots license to fly the plane) and a civilian air technician at the time of the accident (J.A. 79, 80, 118, 587, 588). And he was then doing the work of an air technician in a supervisory position (J.A. 70, 79, 80, 121, 137, 138, 139, 140). McCoy was not in a flying training period at the time of the accident. (J.A. 80, 121, 136, 146, 147, 152-153, 161-163, 167, 586-587.)

Under Maryland law, there is a presumption that the operator of a vehicle is the agent, servant or employee of the owner thereof. The presumption is rebuttable. *Keitz*, *supra*; *Fowser Fast Freight* v. *Sim-*

mont, 196 Md. 584, 588, 78 A. 2d 178 (1946); *Pennsylvania R.R.* v. *Lord*, 159 Md. 518, 151 A. 400 (1930).

Under the law of Maryland, it is also presumed that the agent, servant or employee was operating the vehicle within the scope of his employment. This presumption may also be rebutted. *Brown* v. *Bendix Aviation Corporation*, 187 Md. 612, 621, 622, 51 A. 2d 292 (1947); *Erdman* v. *Horkheimer*, 169 Md. 204, 206, 207, 181 A. 221 (1935).

Article 1-A, Sec. 10, p. 197, Anno. Code of Maryland, (App. p. 22a) provides that the liability of an aircraft owner for mid-air collision is to be determined by the law applicable to torts on land. Under this statute, the presumption of agency through ownership would apply to aircraft.

Here the jet aircraft involved was owned by the United States, was in the possession of McCoy, and was being piloted by him. Under the law of Maryland, the state where the airplanes collided and crashed, a presumption arises from those facts that McCoy was acting as an employee of the United States within the scope of his employment at the time of the occurrence.

Although the presumption of agency may be rebutted, the burden of overcoming it rests upon the defendant. The Government failed to satisfactorily rebut this presumption. Instead, the evidence overwhelmingly supports the Respondents' position that at the time of the occurrence McCoy was acting as a civilian employee of the United States in the scope and course of his employment.

The Court of Appeals examined the law of Maryland concerning the liability of a private person for

the negligence of his agent and held that the decisive test for determining a master-servant relationship is the "right of control." (Petition, 12a) That this is a proper interpretation of Maryland law can be seen from *Keitz* v. *National Paving & Contracting Co.*, 214 Md. 479, 491, 134 A. 2d 296, 301 (1957), where the court said:

> ". . . it is not the manner in which the alleged master actually exercised his authority to control and direct the action of this servant which controls, but it is his *right* to do so that is important. *Sun Cab Co.* v. *Powell*, 196 Md. 572, 578, 77 A. 2d 783 . . ." [Emphasis in the original.]

Petitioner admits that "The result reached by the Court of Appeals did not stem from any misapprehension as to State law." (Petition 22).

Whether the United States had the "right to control" the action of McCoy at the time of the occurrence depends on the employment relationship that existed between McCoy and the United States at that time. To determine the nature of the employment relationship, it is necessary to examine ANGR 40-01 3 (b), wherein the Department of the Air Force expressly delegates the authority of federal officials to supervise caretakers in the performance of their work, subject however to instructions that may be issued by the National Guard Bureau (J.A. 658).

The Federal government did not stop with its right to control McCoy in the performance of his civilian work. It actually exercised control over him.

National Guard Regulation No. 75-16 (NGR 75-16), entitled "Accounting Clerks and Caretakers" issued

by order of the Secretary of the Army, through the National Guard Bureau on December 29, 1947 (Pltf's. Ex. 15, J.A. 634-645), and ANGR 50-01, issued November 27, 1950 (Def's. Ex. 9, J.A. 671-677) disclose, the detailed control which the United States exercised over caretakers employed under the authority of 32 U.S.C. Sec. 709, and the use of the Adjutants General of the State made by the Department of the Air Force, and by the Chief, National Guard Bureau to carry out Federal orders, directives, and procedures governing caretakers (App. pp. 1a-3a, 21a). Any authority exercised over McCoy as a civilian maintenance supervisor stems from a direct delegation of authority by the Secretary of the Air Force. Col. Kilkowski, McCoy's immediate superior, was the Base Detachment Commander to whom the Adjutant General delegated the actual work of daily supervision of McCoy in his capacity as an air technician-caretaker, working in a supervisory maintenance position. McCoy's work was confined exclusively to Federally-owned equipment. And any authority or control exercised over him was in conformity with Federal directions and regulations issued by the Air Force and the National Guard Bureau. (Defendant's Exhibit 7, A.F.R. 45-2, 20a)

As was pointed out by the Court of Appeals, the functions lodged by the United States in the State Adjutant General did not serve to supplant this right of control in the United States, though it may be said to have been ancillary thereto. (Petition, Appendix, A. 7a).

Following the accident there were admissions and affirmative acts of authorized employees of the United States confirming the fact that McCoy was acting in his capacity as an employee of the Federal Government at the time of the accident.

The certificate prepared by Col. Ebaugh is an admission against interest on the part of the United States. *Chicago* v. *Greer*, 9 Wall 726 19 L. ed. 769 (1870), 20 Am Jur., *Evidence* Sec. 603, p. 516 (perm. ed. 1939). Col. Ebaugh, in certifying McCoy was an employee of the United States at the time of the occurrence, was acting in his official authorized capacity (J.A. 276); therefore, his certificate is an admission by the United States.

The fact that the United States took an assignment from McCoy is also further evidence that he was an employee of the Government at the time of the occurrence. *Pittsburg Construction Co.* v. *Gannon*, 46 U.S. App. D.C. 131 (1917).

It is clear from the foregoing authorities that the certification of Col. Ebaugh as to McCoy's status at the time of the occurrence, the subsequent payment of compensation benefits, and the assignment taken by the United States from McCoy, all must be taken as evidence tending to show that McCoy was an employee of the United States Government at the time of the occurrence. They are evidence admissible both as admissions and as records made in the normal course of business. The District Court found that McCoy was actually performing the duties incident to his "civilian caretaker status" at the time of the occurrence, and the Court of Appeals affirmed this finding, stating, ". . . in an ultimate sense the right of control was in the Federal Government at the time and in the circumstances of this accident . . ." (Petition, Appendix A, 7a).

The Court of Appeals further held that the flight in question by McCoy "entailed the performance of

his caretaker and maintenance duties" and, in the performance of "his property maintenance function . . . the ultimate right of control over him was in the United States." (Petition, Appendix A, 6a-7a).

The Petitioner does not question the several indicia relied on by the District Court and the Court of Appeals, but instead argues as to the effect to be given these factors in determining "right of control." The effect to be given these factors is a question of state law, in this case the law of Maryland, and not a federal question. This is not a proper subject for review on a petition for a writ of certiorari. As has been shown, even if the question of "right of control" were solely a question of federal law and therefore subject to review by petition for certiorari, the United States had sufficient "right of control" to make it liable, if a private person, under the law of Maryland for the negligent acts of McCoy.

There must always of necessity be a considerable measure of federal control over Air National Guard units. When the Air National Guard was established, it was done within a framework similar to the Army National Guard, even though there was no genuine connection or relationship between high speed jet aircraft and a state mission. But the courts have always looked to the substance rather than allowing form to cloak reality. If, in fact, federal support were to be withdrawn from the various Air National Guard units, it would mean no federal pay, no airplanes, no fuel, no hangars, no runways, no maintenance mechanics (air technicians), no parts for replacement, no medical care or sickness or death benefits. It would mean no Air National Guard.

3. There Is No Conflict Of Decisions

As to the contention of Petitioner that the decision of the Court of Appeals in this case creates a conflict with the decision in *Pattno* v. *United States*, 311 F. 2d 604 (10th Cir. 1963), cert. denied, 373 U.S. 911 (Petition 24), comparison of the two decisions demonstrates no such conflict. In *Pattno* the court held, at 606, that a "caretaker" is an employee of the United States, citing *United States* v. *Holly*, 192 F. 2d 221 (10th Cir. 1951), and in *Pattno*, footnote 11, cited numerous other cases which followed and approved of the decision in *Holly*. The court however further held that the evidence showed that Meckem, the pilot of a plane, was a flying training instructor engaged at the time of the accident in a flight to evaluate the flying skill of Anderson, a member of the Wyoming Air National Guard, and that while training a member of this National Guard, Meckem was performing work which, both under federal constitution and statutes, was the business and responsibility of the state. Other than holding Meckem was an employee of the United States, as the lower Court found McCoy to be here, any further similarity between that case and this one is simply not present. The lower courts held that Meckem was not acting as an employee of the United States and this court denied certiorari.

Pattno is further distinguishable from the instant case by reason of the fact that in *Pattno*, the Court of Appeals, applying the law of Wyoming, the place of the occurrence, held that under Wyoming law one of the most important tests governing the application of the doctrine of "respondeat superior" is "who *had* control over the servants." This test is much more restrictive than the test for "respondeat superior"

under the law of Maryland. The Maryland test is "who had the right of control," and it is not "the manner in which the alleged master actually exercised his authority to control and direct the action of the servant, . . . but it is his *right* to do so that is important"; *Keitz* v. *National Paving & Contracting Co.*, 214 Md. 479, 491, 134 A. 2d 296, 301 (1957). This broader application of the doctrine of "respondeat superior" under the law of Maryland was relied upon by the Court of Appeals in the instant case. (Petition, Appendix A, 7a, 11a, 12a).

As has been shown, the question whether the United States had a "right to control" caretakers so as to render it liable, if a private person, for the negligent conduct of McCoy, was therefore correctly decided under the applicable law of Maryland.

CONCLUSION

Respondents therefore respectfully submit that the decision below is clearly correct, and that there is no conflict of decisions between the circuits with respect to the issues here involved. The Petitioner has failed to show any "special and important" reason for granting review on a writ of certiorari.

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November 1963

APPENDIX

Plaintiff's Exhibit 15, National Guard Regulations No. 75-16

(J.A. 634-39)

1. *Authority:* Accounting clerks and caretakers referred to in these regulations are employees authorized under the provision of section 90, National Defense Act, for the administration and care of material, armament, vehicles, and equipment provided for the National Guard and used solely for military purposes. The Secretary of the Army has delegated to the several adjutants general of States, Territories, and the District of Columbia, authority to employ, fix rates of pay, establish duties and work hours (not to exceed 40 hours per week), and to discharge employees within the purview of this regulation; subject to the provisions of law and such instructions as may from time to time be isued by the Chief, National Guard Bureau. (JA 635)

2. *Definitions:* The following definiitons are applicable:

b, *Caretakers* (Army) are male, civilian employees authorized as supervisors, mechanics, and technicians. They may be divided into two main categories.

(1) *Unit Caretakers:* Employees who work directly under the supervision of a company or similar unit commander and are responsible to that commander for the care, maintenance, and repair of the unit equipment.

(2) *Pool Maintenance Caretakers:* Employees who work in or from fixed shops, under the direction of shop or pool supervisors and under the general supervision of the State maintenance officer. They are responsible for the inspection, repair, and reconditioning of equipment pertaining to National Guard organizations. (JA 635)

c. *Caretakers* (Air) are male civilian employees authorized by law for maintenance, repair, and inspection of equipment issued to the National Guard Air units.

3. *Number:* The number of accounting clerks and caretakers authorized to be paid from Federal funds in each State will be announced periodically by the Chief, National Guard Bureau. This number will be based on geographic considerations, troop strengths, the amount and types of equipment issued to the State, and upon funds made available for the National Guard. The number of personnel actually paid from Federal funds may exceed the total specified from time to time by the Chief, National Guard Bureau, if employment is on a part-time basis and funds alloted for each job are not exceeded. (JA 636)

4b. *Caretakers (Army)*

(1) *Unit caretakers* must be members of the National Guard and of the unit for which employed. They must be qualified to perform maintenance, at the organizational level, on the equipment for which the unit commander will be responsible. Such qualifications will be determined by appropriate aptitude tests. (JA 636).

c. Caretakers (Air) must be members of the National Guard and must be able to perform the duties specified for the particular job in AAF Manual 35-0-1 "Military Personnel, Classification and Duty Assignment," 3 April 1944 (as revised) or WD TM 12-427 "Military Occupational Classification of Enlished Personnel," 12 July 1944 (as revised). However, they may be trained in additional duties as may be required by the unit commanders. Commissioned officers of the National Guard Air Units may be employed as caretakers only in the Military Occupational Specialty

positions indicated in current chart for Permanent Caretaker Detachment, National Guard Air units. (JA 637)

7d. Payrolls will be certified by the bonded United States property and disbursing officer and approved by the State adjutant general or an officer designated by him. (JA 639)

CHANGE No. 1

NGR 75-16, 29 December, 1947, is changed as follows:

Authority: Accounting clerks and caretakers referred to in these regulations are employees authorized under the provisions of Section 90, National Defense Act, for the administration and care of materiel, armament, vehicles and equipment provided for the National Guard and used solely for military purposes. The Secretary of the Army had delegated to the several adjutants general of States, Territories and the District of Columbia, authority to employ, fix rates of pay, establish duties and work hours, and to discharge employees within the purview of this regulation; subject to the provisions of law and such instructions as may from time to time be issued by the Chief, National Guard Bureau. (JA 646)

Plaintiff's Exhibit 16, National Guard Regulations No. 75-16

(JA 647) (Superceded)

1. *Purpose:* The purpose of these regulations is to outline the qualifications, duties, rights and obligations of the following personnel (hereinafter referred to collectively as "National Guard civilian personnel"): administrative assistants; accounting clerks; maintenance personnel; rangekeepers; and administrative, supply and main-

tenance technicians, and to prescribe the procedure for the payment of these individuals.

2. *Authority:* National Guard civilian personnel referred to in these regulations are employees authorized under the provisions of Section 90, National Defense Act, for administrative and accounting duties, maintenance repair and inspection of materiel, armament, vehicles and equipment provided for the National Guard and used solely for military purposes. The Secretary of the Army has delegated to the adjutants general of the several States, Territories, Puerto Rico, and the District of Columbia, the authority to employ, fix rates of pay, establish duties and work hours (a minimum of 40 hours per week), supervise and discharge employees within the purview of these regulations; subject to the provisions of law and such instructions as may from time to time be issued by the Chief, National Guard Bureau. (32 U.S.C.A. 42 and 42a; G.O. No. 96, Dept. of the Army, 9 Nov. 51).

3. *Definitions:* a. Administrative assistants are federally recognized officers, warrant officers or enlisted men employed as civilians to act as civilian administrative assistants to commanders in the performance of such duties, responsibilities and administrative matters for which the commanders are responsible, or may be required to perform. (JA 648-649)

Plaintiff's Exhibit 17, ANGR 40-01

SECTION I—*General.*

1. *Purpose:* This Regulation provides a manning guide for the Air National Guard civilian personnel program and establishes policies and procedures applicable to Air National Guard civilian personnel. (JA 656)

2. *Policy:* a. Air National Guard civilian personnel shall be utilized to effect maximum efficiency in administra-

tion, supply, operations, training, and maintenance of the Air National Guard.

b. Air National Guard civilian personnel must be federally recognized members of the Air National Guard of the State, Territory, Puerto Rico, or the District of Columbia except for the employment of:

(1) Females (when specifically authorized by the Chief, National Guard Bureau).

(2) Temporary personnel paid from funds other than those designated for the pay of air technicians.

e. Airmen type air technician positions may be transferred to other units or organizations, or the position may be changed to another authorized position at the discretion of the State adjutant general, except that such positions may not be transferred to or from Headquarters, State Air National Guard without prior approval of the Chief, National Guard Bureau.

f. Officer type air technicians positions may not be transferred or changed without prior approval of the Chief, National Guard Bureau. (JA 657)

h. Air National Guard civilian personnel may not accept outside employment which interferes or conflicts with the performance of their Air National Guard civilian duties.

k. Officers required to meet a Federal recognition board should not be employed prior to receipt of Federal recognition, and any individual if so employed accepts such employment at his own risk. Officers exempted from meeting a Federal recognition board may be employed and paid from the date the individual is appointed. Airmen may be employed upon completion of the oaths of enlistment.

1. The authority governing matters pertaining to Air National Guard civilian personnel is contained in this regulation and will be quoted as reference in special orders and other official action.

3. *Authority*

a. Basic authority for the employment of Air National Guard civilian personnel is contained in Section 90, National Defense Act, as amended.

b. Authority is delegated to the adjutants general of the several States, Territories, Puerto Rico, and the District of Columbia, to employ, fix rates of pay, establish work hours (a minimum of 40 hours per week) supervise and discharge employees within the purview of this regulation; subject to the provisions of law and such instructions as may be subsequently issued by the Chief, National Guard Bureau. (JA 658)

5. *Definitions:* For the purpose of this Regulation:

a. "Air National Guard civilian personnel" means any and all civilians employed by the several States, Territories, Puerto Rico, and the District of Columbia, permanent or temporary, male or female, supported wholly or in part by Federal funds appropriated for that purpose, including but not limited to the following:

(1) Air technicians means a person employed for the performance of the duties of positions listed on the manning guide and paid from funds designated for the pay of air technicians. (JA 659)

Plaintiff's Exhibit 3

ANGM 40-01

AIR NATIONAL GUARD MANUAL

CIVILIAN PERSONNEL MANUAL

1 March 1958

Department of the Air Force • National Guard Bureau

ANG Manual 40-01

Department of the Air Force
Washington, 1 March 1958

FORWORD

The Air National Guard Civilian Personnel Manual is issued to provide staff and operating personnel with a convenient reference to the titles, grade, job number and duties of civilian personnel in the Air National Guard. Provisions are also included for the submission of recommendations for new or revised positions, grades and titles.

Provisions of this manual will govern all Air National Guard civilian employees, including those employed on a temporary hourly rate basis except those hired wholly from State or service contract funds, and will become effective as of 1 April 1958.

All Air National Guard civilian personnel will be permitted access to the contents of this manual and will be fully acquainted with the duties and responsibilities of their positions.

Recommendations or suggestions for the improvement of procedures or position descriptions of this manual are

encouraged. Comments may be forwarded to National Guard Bureau, NG-AFOTP, Washington, D. C.

BY ORDER OF THE SECRETARY OF THE AIR FORCE:

EDGAR C. ERICKSON
Major General
Chief, National Guard Bureau

OFFICIAL:

JAMES E. BARBER
Colonel, NGB
Executive

DISTRIBUTION:

1 ea AG

1 ea USP&FO

4 ea Flying Detach

1 ea Non-Flying Detach

The listing below is in numerical order according to job numbers. The status indicates the position can be occupied by Officer (O), Warrant Officer (WO)*, Airman (A), Female (F), and Non-Guardsman (X). The job title and career field title indicate the technician job title and corresponding Air Force career field and title. These are the new position numbers and titles; for the conversion see Section II, Paragraph 12.

* An airman who is appointed warrant officer may be retained in his airman type position. A warrant officer will not be hired direct into airman type positions except into the position of Aircraft Maintenance Chief, Job Number 43-10.

Job No.	Status	Job Title	Career Field and Title
00-00	O	Base Detachment Commander	00 Commanders
00-01	O	Base Detachment Commander	00 Commanders
00-02	O	Base Detachment Commander	00 Commanders
00-03	O	Training Site Supervisor	00 Commanders
00-04	O	Training Site Supervisor	00 Commanders
14-00	O	Operations Supervisor	11 Opns & Trng
14-01	O	Flying Training Instructor	14 Opns & Trng
23-09	O	Intelligence Photo Radar Supv	23 Photographic
23-10	A	Photo Technician	23 Photographic
23-11	A	Photo Tech and Repairman	23 Photographic
23-12	A	Photo Lab Technician	23 Photographic
23-13	A	Camera Repairman	23 Photographic
27-10	A	Air Operations Specialist	27 Air Traffic Cont & Wng
27-11	A	Air Operations Technician	27 Air Traffic Cont & Wng
30-00	O	Communications Supervisor	30 Comm & Electronics
30-01	O	Radar Station Commander	30 Comm & Electronics
30-02	O	Radar Station Commander	30 Comm & Electronics
30-03	O	Tactical Control Sq Commander	30 Comm & Electronics
30-04	O	Tactical Control Gp Commander	30 Comm & Electronics
30-05	O	Comm & Electronics Supervisor	30 Comm & Electronics
30-10	A	Radio-Radar Maint Supt (Ground)	30 Radio-Radar Systems
30-11	A	Radar Maint Tech (Airborne)	30 Radio-Radar Systems
30-12	A	Radar Mechanic (Airborne)	30 Radio-Radar Systems
30-14	A	Radar Maint Technician (Gnd)	30 Radio-Radar Systems
30-15	A	Radar Mechanic (Ground)	30 Radio-Radar Systems
30-17	A	Radio Maint Tech (Airborne)	30 Radio-Radar Systems
30-18	A	Radio Mechanic (Airborne)	30 Radio-Radar Systems
30-20	A	Radio Maintenance Tech (Gnd)	30 Radio-Radar Systems
30-21	A	Radio Mechanic (Ground)	30 Radio-Radar Systems
30-23	A	Communications Technician	30 Radio-Radar Systems
32-10	A	Fire Control Superintendent	32 Fire Control Systems
32-11	A	Fire Control Technician	32 Fire Control Systems
32-12	A	Fire Control Specialist	32 Fire Control Systems
34-10	A	Flight Simulator Technician	34 Training Devices
34-11	A	Flight Simulator Specialist	34 Training Devices
34-12	A	Synthetic Trainer Technician	34 Training Devices
42-10	A	Hydraulic Technician	42 A/C Accessories Maint
42-11	A	Propeller Technician	42 A/C Accessories Maint
42-13	A	Instrument Technician	42 A/C Accessories Maint
42-14	A	Electronic Fuel Cont Tech	42 A/C Accessories Maint
42-15	A	Electrical Technician	42 A/C Accessories Maint
42-16	A	Electronic Fuel Cont. Specialist	42 A/C Accessories Maint
43-00	O	Maintenance Supervisor	43 Maint & Engineering
43-10	O-WO	A Aircraft Maintenance Chief	43 Aircraft & Eng Maint
43-11	A	Chief Maintenance Inspector	43 Aircraft & Eng Maint
43-12	A	Maintenance Inspector	43 Aircraft & Eng Maint
43-13	A	Aircraft Maint Technician	43 Aircraft & Eng Maint
43-14	A	Senior Aircraft Mechanic	43 Aircraft & Eng Maint
43-15	A	Aircraft Mechanic	43 Aircraft & Eng Maint
43-16	A	Jet Eng Maint Supt	43 Aircraft & Eng Maint
43-17	A	Jet Engine Technician	43 Aircraft & Eng Maint
43-18	A	Jet Engine Mechanic	43 Aircraft & Eng Maint
43-19	A	A/C Dock Superintendent	43 Aircraft & Eng Maint
43-20	A	Flight Engineer Technician	43 Aircraft & Eng Maint
45-10	A	Production Scheduling Tech	45 Productions Control
46-10	A	Munitions & Weapons Tech	46 Muntns & Wpns Maint
46-11	A	Munitions and Weapons Spec	46 Muntns & Wpns Maint

Job No.	Status	Job Title	Career Field and Title
47-10	A	Motorized Equip Superintendent	47 Motor & Misc. Maint
47-11	A	Mechanic (General)	47 Motor & Misc. Maint
47-12	A	Gnd Pow & Support Equip Rpmn	47 Motor & Misc. Maint
47-13	A	Vehicle Operator (Mechanic)	47 Motor & Misc. Maint
53-10	A	Machinist	53 Metal Working
53-11	A	Sheet Metal Technician	53 Metal Working
53-12	A	Welder	53 Metal Working
55-00	O	Instals Facilities Supv	55 Instals Engineering
57-10	A	Crash/Fire Rescue Specialist	57 Firefighting
58-10	A	Parachute Rigger & Repairman	58 Fabric, Lthr & Rubbr
59-10	A	Boat Master	59 Marine
59-11	A	Marine Engineer	59 Marine
64-00	O	Supply Supervisor	64 Supply
64-01	O	Assistant Supply Supervisor	64 Supply
64-10	A	Editing & Doc Control Tech	64 Supply
64-11	A	Supply Records Specialist	64 Supply
64-12	A	Refueling Unit Operator	64 Supply
64-13	A	Warehouse Specialist	64 Supply
64-14	A	Warehouse Specialist (Apr)	64 Supply
64-15	A	Petroleum Specialist	64 Supply
64-16	A	Clerk Parts (Maintenance)	64 Supply
64-17	A	Purchasing & Contracting Spec	64 Supply
64-18	A	Warehouse Superintendent	64 Supply
64-19	A	Inventory and Inspec Spec	64 Supply
64-20	A	Supply Records Superintendent	64 Supply
64-21	A	Org Supply Superintendent	64 Supply
64-22	A	Org Supply Technician	64 Supply
64-23	A	Clerk Parts (Maintenance)	64 Supply
64-24	A	Org Supply Specialist	64 Supply
64-25	A	Transportation Specialist	64 Supply
64-26	A	Supply Specialist (Apr)	64 Supply
67-10	A	Accounting Specialist	67 Fin, Acctg & Auditing
67-11	A	Finance Specialist	67 Fin, Acctg & Auditing
68-00	O	Accounting Supervisor	68 Comptroller
68-01	O	Accounting Supervisor	68 Comptroller
68-02	O	Accounting Supervisor	68 Comptroller
70-01	O	Administrative Supervisor	70 Administration Services
70-02	O	Administrative Supervisor	70 Administration Services
70-03	O	Administrative Supervisor	70 Administration Services
70-04	O	Administrative Assistant (State)	70 Administration Services
70-05	O	Administraive Asst. (State)	70 Administration Services
70-06	O	Administratige Asst. (State)	70 Administration Services
70-11	A	Administrative Technician	70 Administration

SECTION I

GENERAL PROVISIONS

1. *Format*

This manual is issued in loose-leaf form to facilitate reference and current maintenance. Changes to this manual will be effected by rescission, additions, and deletions of specific pages or of entire sections, based on the extent of change to be effected.

2. *Maintenance of Manual*

a. Copy or copies of this manual will be maintained by each office listed on the distribution. Any changes will be forwarded by numbered transmittal sheets and inserted in the appropriate space within the manual.

b. The following internal distribution is recommended:

(1) Each major functional area at a flying base should maintain a copy of the manual—supply, maintenance, operation and administration. The other functional areas will consult the administrative copy.

(2) Each non-flying detachment not located on or not fully dependent on a flying base should maintain a copy to include Headquarters State Air National Guard, electronics and communications units or detachments and other detachments that "need to know" may request copies from National Guard Bureau, AFOTP.

3. *Delegation of Authority*

The authority of the National Guard Bureau to regulate the employment and rates of compensation is contained in Department of the Army General Order 96, dated 9 November 1951, subject, "Delegation of Authority for the Employment and Fixing of Salaries for All Caretakers and Clerks in the National Guard Bureau."

4. *Policy*

a. It is the policy of the National Guard Bureau that positions will be classified in an orderly manner to provide a systematic basis for salary or wage determination, as well as for the application of the various processes of air technician personnel management and administration. This policy, applied within the framework of governing laws and regulation, will facilitate the equal treatment within each classification and pay category of employees performing comparable work.

b. In order that this policy may be made operative, it is necessary that pay rates bear a direct relationship to the level of responsibility and qualification required for the work performed. Through a process of job evaluation both National Guard Classified (NGC) and National Guard Maintenance (NGM) positions are graded to provide for the equitable application of the appropriation salary or wage schedules.

c. To provide for effective administration of the program, the classification structure will be maintained through periodic manpower management surveys and desk audits of positions.

5. *Responsibility*

a. Adjutants general of various States, Territories, Puerto Rico or the District of Columbia will be responsible for:

(1) Insuring that the requirements and policies of the Air National Guard position classification program are followed at all air technician detachments.

(2) Furnishing recommendations, suggestions, and information to the National Guard Bureau on matters pertaining to classification standards, or on policies, techniques, and procedures affecting the position classification program.

(3) Maintains contact with the Civilian Personnel Office at nearest military installation and assists him in gathering information necessary for proper adjustment of the locality pay schedule.

b. The base detachment commander or senior air technician will be responsible for:

(1) Implementing and maintaining the position classification program as a means to facilitate the personnel management process in the accomplishment of the air technician detachment mission.

(2) Furnishing the State adjutants general with information, suggestions, or recommendations pertinent to classification policies, techniques, and procedures affecting the position classification program.

(3) Promoting the position classification program and assuring its understanding and implementation by supervisors and all employees.

(4) Keep current on the standard pay rates in their locality and advise the adjutant general of material changes. Maintain close coordination with the Civilian Personnel Office at the nearest military installation.

6. *Categories of Positions*

There are two major categories of positions in the National Guard Air Technician Program which are the National Guard Classified (NGC) type and the National Guard Maintenance (NGM) type.

a. National Guard Classified Type Positions (NGC). This type of category is characterized by administration, clerical, certain supervisory and professional type positions. Numerical designations of the grade are the same as those in the General Schedule of Employees of the United States Civil Service. The National Guard Bureau

is guided by the Classification Act of 1949 and pay rates for this category are controlled by Congressional action.

b. National Guard Maintenance Type Positions (NGM). This type of category is characterized by trade, craft, maintenance, and labor type positions. These positions are similar to United States Civil Service Wage Board positions and pay rates are adjusted by periodic surveys conducted by the Army-Air Force Wage Board. The following pay rates are included in this category classification:

(1) *National Guard Maintenance (NGM).* Technically skilled positions primarily concerned with the accomplishment of specific tasks and duties related to crafts, trades, maintenance of equipment and physical labor. The employees in these positions accomplish tasks and duties as directed by supervisory personnel.

(2) *National Guard Maintenance—Leader (NGM-L).* Technically skilled positions in which the employees exercise responsibility for the work of the positions stated in (1) above, and participate in the accomplishment of assigned duties and tasks.

(3) *National Guard Maintenance—Supervisor (NGM-S).* Technically skilled positions primarily concerned with direct supervision of the duties and tasks assigned to the employees in positions (1) and (2) above. Incumbents of these positions must be qualified to perform the work assigned to the employees under their supervision.

7. Use of Manual

A copy of this manual will be available for review and reference by supervisors and by employees. Ready access to the manual is essential for an understanding by Air National Guard civilian and military commanders of the responsibilities of Air National Guard civilian personnel.

MAINTENANCE SUPERVISOR

Grade: NGC-11

Job Number: 43-00

1. NATURE AND PURPOSE OF WORK:

A. *Introduction:*

The position is located in the Maintenance Division of an Air Technician Detachment. The incumbent is responsible for coordination, superivsion and control within the maintenance division for aircraft maintenance, (field and organzational type), electronics, motor vehicle and support equipment. Incumbent will maintain proper administrative practices when carrying out his responsibilities, using all accepted management principles.

B. *Duties:*

1. Supervises the Production Control Section to assure that all activities of maintenance are planned and coordinate properly. Arranges for work assignments and deadlines on priority jobs in coordintion with production control.

2. Will supervise the Quality Control activity to assure that the section complies with all technical orders and similar directives on aircraft maintenance, inspections, and like activities.

3. Establishes, directs, and administers policies and procedures for all maintenance functions to include: electronics, electrical, hydraulics, machinist, welder, instruments, auxiliary hangar equipment, engine shop, motorized equipment, etc.

4. Advises or assists superintendents of the various maintenance areas in the more difficult technical problems involving supply, maintenance, repair, modification and

storage. Recommends actions regarding requisitions and disposition of property.

5. May conduct a school or training class for the purpose of training present or future superintendents in the technical administrative problems involving the various functions of management.

6. Is responsible for ground safety, fire and crash rescue as concerns the Maintenance Division.

7. Responsible for personnel practices in the Maintenance Division to include: approval of leave, recommends promotions, separations, transfers, disciplinary actions, interviews new employees, etc.

8. Responsible for obtaining bids for contractual maintenance services. Formulates instructions, specifications, and other material necessary to obtain bids. Decides what bid to accept and assures completeness of contract with coordination with the Base Supply Supervisor.

C. *Responsibility for Work of Others:*

1. The incumbent is directly responsible for the Aircraft Maintenance Chief, Communications and Electronics Supervisor, and Motorized Equipment Superintendent.

2. The total maintenance area is controlled and managed by the Maintenance Supervisor which involves a minimum of 30 Civilian Air Technician employees.

II. Scope and Effect of Work:

The incumbent is responsible for the efficient management of the maintenance shop, electronics, motor vehicles, and all allied activities. The degree of efficiency with which he operates will directly reflect in the over all operation of the Air National Guard.

III. Supervision and Guidance Received:

Under general supervision of the Base Detachment Commander. The incumbent develops his own work procedures, generally establishes priorities and is primarily responsible for operation of the Maintenance Division.

IV. Mental Demands:

Must be thoroughly familiar with all operations of the Maintenance Division to include all aircraft repair and maintenance, motorized equipment repair, ground safety, supply, etc. Must be able to advise or answer any technical question involving his division. Occasionally operates maintenance function under extensive heavy workload, which calls for organized planning and coordination within the section.

V. Personal Work Contact:

Contacts are with subordinate personnel Base Detachment Commander, Air Force Inspectors, and visiting personnel from the Air Force and the National Guard Bureau.

VI. Qualifications:

A. *Mandatory:*

1. Must possess six years overall experience in all phases of aircraft maintenance and repair of allied equipment.

2. Completion of an Air Force course in maintenance.

3. Must have management background, either military or civilian.

B. *Desirable:*

1. Completion of an Air Force maintenance management course.

2. Be a rated pilot on flying status to enable incumbent to make test flights on assigned aircraft.

AIRCRAFT MAINTENANCE CHIEF

Grade: NGMS-9

Job Number: 43-10

1. GENERAL:

The position is located in the Aircraft Maintenance Section, Maintenance Division, of an Air Technician Detachment. The incumbent is responsible for hangar and flight-line maintenance, inspections, and repair of all aircraft, jet or conventional, assigned and transient. Incumbent must be thoroughly familiar with all technical phases of aircraft maintenance and allied equipment. Required to know and understand management principles and their application when dealing with subordinates. The efficiency with which the incumbent performs his work will contribute greatly to the over-all mission of the Air National Guard within a State.

II. DUTIES AND RESPONSIBILITIES

1. Responsible for production planning and control of the Aircraft Maintenance Section, coordinating activities with the Production Scheduling Technician and the Maintenance Supervisor. Arranges for work assignment and deadlines on priority jobs in coordination with production control.

2. Directly supervises all field type maintenance (hangar maintenance) including aircraft docks, and all shops. The shops consist of hydraulic, propeller, instrument, electrical, jet engine repair and build-up, sheet metal, and machinist.

3. Directly supervises all flight line maintenance (organizational maintenance) including all unscheduled maintenance.

4. Assigns work to subordinates considering individual skills, aptitudes and knowledge.

5. Performs necessary follow-up on all assigned jobs. Must be aware of any work stoppage, problems or bottlenecks that may occur during the operation and take necessary steps to resolve these difficulties. Maintenance duties which will be accomplished consist of: scheduled aircraft and engine inspections, scheduled engine and accessory change, unscheduled maintenance, etc.

6. Conducts personnel actions that may include; approval of annual and sick leave and forwards it for final approval, settles complaints arising from work assignments, pay and job requirements, takes necessary action to create good work habits, and shifts personnel as required to meet peak workloads. Refers problems to the Maintenance Supervisor when they cannot be settled at this level.

III. Physical Work Effort:

Active; climbs, working in straining position.

IV. Working Conditions:

Inside and outside work; in proximity of moving propellers and jet engine blasts; danger of falling; danger of fumes and fire from high octane gasoline.

V. Qualifications:

A. *Mandatory:*

1. Minimum of five (5) years' experience as an Aircraft Maintenance Technician, either civilian or military capacity.

2. Capable of researching, reading, and understanding technical orders, technical manuals, and stock lists.

3. Must be familiar with Air National Guard and Air Force aircraft maintenance procedures.

B. *Desirable:*

Graduate of formal maintenance training courses equivalent to the requirements for an A&E certificate.

Defendant's Exhibit 7. AFR 45-2

2. *General. b. Air National Guard* — The National Guard Bureau is charged with administering approved Department of the Air Force policies other than those relative to training, for the Air National Guard not in the Federal service, and with promulgating Department of the Air Force directives and regulations applicable to the Air National Guard, including those relative to training (J.A. 688)

4. *National Guard Bureau Regulations.* a. The National Guard Bureau will, from time to time, publish joint National Guard Regulations when such regulations are applicable to both the Army and Air National Guard, or separate National Guard Regulations when such regulations are applicable to the Army National Guard only or to the Air National Guard. National Guard Regulations will govern the Army National Guard and the Air National Guard when not in Federal service in the same manner as Army Regulations or Air Force Regulations govern the Regular components of the service.

b. Joint National Guard Regulations will be issued subject to the approval of the Chief of Staff, United States Army, and the Chief of Staff, United States Air Force. National Guard Regulations pertaining to the Army National Guard only will be issued subject to the approval of the Chief of Staff, United States Army. National Guard Regulations pertaining to the Air National Guard only will be issued subject to the approval of the Chief of Staff, United States Air Force. (J.A. 669-670)

Defendant's Exhibit 9. ANGR 50-01

1. Training authority: The requirements to be met and the sources of authority for the training and instruction of the Air National Guard not in Federal service are set forth in the following:

a. Sections 5, 91, 92, 93, 94, 96, 97, and 99, National Defense Act, as amended, and Sections 201 and 501, Public Law 351, 81st Congress, hereafter referred to as Career Compensation Act of 1949.

b. Air National Guard Regulations.

c. The policies of the Department of the Air Force.

d. The orders, instruction, and training announcements issued by the Chief of Staff, United States Air Force pursuant to authority specifically delegated to him by the Secretary of the Air Force.

e. The orders and detailed instructions promulgated by the Chief, National Guard Bureau to the Air National Guard not in Federal service with the approval of the Chief of Staff, United States Air Force, in amplication of, and to make effective, the policies indicated in c above.

2. National Guard Bureau Instructions. The Chief, National Guard Bureau is charged with promulgating to the Air National Guard not in Federal Service, from time to time, the necessary orders and instructions to make effective the Department of the Air Force training policies.

a. The training of the Air National Guard will conform to the Department of the Air Force policies and directives as prescribed for the Regular Air Force.

b. It will be conducted by the Air National Guard organizations of the respective States under the supervision of the commanding generals of the appropriate major forces, in accordance with the policies prescribed by the

Department of the Air Force. Such supervision will be exercised by:

1. Preparation of training directives.

2. Supervision of United States Air Force Instructors.

3. Authority to conduct inspections.

4. Conduct of tests.

5. Furnishing the Department of the Air Force with appropriate reports on state of training and recommendations for necessary remedial actions. (J.A. 671-673)

5 United States Code 751

Disability or death of employee: willful misconduct. The United States shall pay compensation as hereinafter specified for the disability or death of an employee resulting from a personal injury sustained while in the performance of his duty, but no compensation shall be paid if the injury or death is caused by the willful misconduct of the employee or by the employee's intention to bring about the injury or death of himself or of another, or if intoxication of the injured employee is the proximate cause of the injury or death. (Sept. 7, 1916, c. 457, Sec. 1, 39 Stat. 742).

Article 1A, sec. 10, pg. 197, Annotated Code of Maryland, 1951

(Collision of Aircraft) The liability of the owner of one aircraft to the owner of another aircraft, or to airmen or passengers on either aircraft, for damage caused by collision on land or in the air, shall be determined by the rules of law applicable to torts on land.